TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 70

AMERICAN FEDERATION OF LABOR, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION AND PACIFIC COAST DISTRICT INTERNATIONAL LONGSHOREMEN'S ASSOCIATION No. 38, PETITIONERS,

vs.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED MAY 26, 1939.

CERTIORARI GRANTED OCTOBER 9, 1939.

SUPREME COURT OF THE UNITED STATES

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NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

INDEX.

[fol. 1] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

APRIL TERM, 1938

No. 7257

AMERICAN FEDERATION OF LABOR, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, and PACIFIC COAST DISTRICT INTERNATIONAL LONGSHOREMEN'S ASSOCIATION No. 38, Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent

PETITION TO REVIEW AND SET ASIDE ORDER OF NATIONAL LABOR RELATIONS BOARD DATED JUNE 21ST, 1938—Filed September 29, 1938

The petition of American Federation of Labor, International Longshoremen's Association, and Pacific Coast District International Longshoremen's Association No. 38, respectfully shows:

1. That petitioner, American Federation of Labor is a national labor organization; that petitioner, International Longshoremen's Association hereinafter called I. L. A. is a labor organization affiliated with the said American Federation of Labor admitting to membership all members engaged in longshore work; that petitioner, Pacific Coast Dis-
[fol. 2] trict International Longshoremen's Association Local 38, hereinafter called Local 38, is a labor organization affiliated with the International Longshoremen's Association, and has jurisdiction over all Pacific Coast Ports North of the Republic of Mexico, and consists of various locals having jurisdiction over one or more ports on the Pacific Coast. That all said petitioners are labor organizations within the meaning of the term as used in the National Labor Relations Act.

2. That the respondent, Labor Relations Board, hereinafter called the Board, is a governmental agency organized under an Act of Congress known as the National Labor Relations Act, 49 Stat. 449, hereinafter called the Act.

3. That the International Longshoremen and Warehousemen's Union District No. 1, hereinafter called the

I. L. W. U., is a labor organization affiliated with the I. L. W. U., an affiliate of the Committee for Industrial Organization, admitting to membership all workers engaged in longshore work; that said International Longshoremen's and Warehousemen's Union District No. 1, has jurisdiction over the ports of Alaska, British Columbia, California, Oregon, Washington and the Hawaiian Islands, and consists of locals having jurisdiction over one or more ports.

4. That the Ship Owners Association of the Pacific Coast, Waterfront Employers Association of the Pacific Coast, Waterfront Employers of Seattle, Waterfront Employers of Portland, Waterfront Employers Association of San Francisco, and Waterfront Employers Association of Southern California, are associations of employers engaged [fol. 3] in the transportation or handling of water-borne cargo on the Pacific Coast of the United States.

5. That between January 10, 1938, and January 30, 1938, and earlier, petitions were filed by the various I. L. W. U. Locals in California requesting an investigation and certification of representatives under Section 9 (c) of the National Labor Relations Act and requesting hearings to determine the appropriate unit of the employees involved; that pursuant to said Act said petitions were consolidated for the purpose of hearing under a case entitled Case No. R-638 and R-572; that hearings on said case were held pursuant to notice in San Francisco, California, from February 15th through February 25th, 1938, inclusive, and on March 25th and 26th, 1938; in Los Angeles, California, on March 7th, 1938; in San Pedro, California, from March 7th, 1938, through March 19th, 1938; in Seattle, Washington, from March 14th through March 17th, 1938, inclusive; and in Portland, Oregon, on March 18th, 1938, before a trial examiner duly designated by the Board, at which witnesses were heard and testimony was taken.

6. That petitioners pursuant to permission appeared at such hearings and were represented thereat, and that all other parties above named participated in and were present at such hearings; that following said hearings the record was transferred to the National Labor Relations Board at Washington, D. C., and that thereafter on the 21st day of June, 1938, said Board filed its findings of fact and con-

clusions of law and order of certification, a copy of which is attached hereto and marked "Exhibit A" and made a [fol. 4] part hereof, in which the said Board determined that the appropriate unit consisted of all the workers doing longshore work for the companies which are members of the said various respondent associations of employers and certified the I. L. W. U. District No. 1 as the exclusive representative of all such workers.

7. That in said decision and order the said Board found that the petitioners represented a majority of the workers doing longshore work employed by the various employer members of the said association in a number of cities and among a number of employers; that said Board none the less decided, held and ordered that the appropriate unit of employees employed by various employers of the various workers in the various ports of the West Coast of the United States consisted of all employees doing longshore work for the employer Associations in the ports on the West Coast of the United States, and certified the said I. L. W. U. District No. 1, as the sole bargaining agent for all such employees; that as a result of said decision and order those employees who are members of the petitioners are obliged to become members of or deal exclusively through the said I. L. W. U. District No. 1, or not at all, and are unable to deal with their respective employers through representatives of their own choosing even though they constitute a majority of said employees of said individual employers.

8. That on August 15th, 1938, said petitioners filed certain objections and exceptions to the said decision and order of certification, a copy of which is attached hereto marked "Exhibit B" and made a part hereof, in which [fol. 5] various points of law were raised; that on the 27th day of August, 1938, said Board entered an order denying said objections, exceptions and motions of the petitioners and sustaining its previous decision and order of certification; that a copy of said order is attached hereto marked "Exhibit C", and made a part hereof.

9. That as a result of said decision and order of certification the said petitioners although selected by a majority of the employees of their respective employers, as their bargaining representatives in accordance with law, are de-

prived of their status as the collective bargaining agent, and are thereby aggrieved by the said decision and order of certification.

10. That said order of certification is contrary to law and contrary to the facts as set forth in the said Board's findings of fact in the above entitled matter, and further that such certification is contrary to the spirit, purpose and intent of the National Labor Relations Act in that said National Labor Relations Act does not contemplate and does not lawfully permit the designation by the Board of an employee unit constituting all the employees of different employers in different and distant geographical districts of the United States.

11. That petitioners have been denied rights accorded them under the National Labor Relations Act, particularly under Section 7 thereof; that petitioners have been denied such rights for the reason that the Board's findings of fact herein state that certain distinct groups of employees are [fol. 6] members of the separate unions, in different geographical locations, and that the members in each of such unions constitute a majority of the employees employed in the longshore work in the respective cities where such unions are located; that such unions are affiliated with the American Federation of Labor and constitute the petitioners herein; that such majority of members in each such union has constituted each such union as its bargaining representative to negotiate with respective employers concerning wages, hours and working conditions; that the order of certification unlawfully denies to the petitioners the right of self-organization and representation as hereinbefore set forth.

12. That for the foregoing reasons the said order of certification of the said Board is void and of no effect; and furthermore, that said order of certification constitutes an unconstitutional deprivation of property and other valuable rights to the American Federation of Labor and its affiliated unions and the members thereof involved in the above entitled matter, who are petitioners herein.

13. That petitioners have exhausted their remedy before said Board and have no other way of preserving and protecting their rights except by appeal to this Court; that said order of certification is as to the petitioners a final

order; that this Court has jurisdiction to hear this appeal from said order by virtue of said National Labor Relations Act; Section 10 (f) thereof.

[fol. 7] Wherefore, your petitioners pray:

(a) That a certified copy hereof be forthwith served according to law, upon the respondents herein named;

(b) That the respondent, National Labor Relations Board may be required in conformity with law, to certify to this Honorable Court a transcript of the record in the proceedings wherein said order was entered, including the testimony, evidence and exhibits taken, the pleadings, the findings, conclusions and order of said respondent;

(c) That the said proceedings, findings, conclusions and order be reviewed by this Honorable Court; that the said order of certification insofar as it attempts to establish a geographical district of many employers in the aggregate as the basis of determining the bargaining agent for longshore workers on the Pacific Coast and denies to the majority of employees employed by a single employer the right to set up the petitioner as the exclusive representative of such employees doing longshore work on the Pacific Coast to be set aside, vacated and annulled, and that said decision be reversed, and said order of certification be set aside;

(d) That this Honorable Court exercise its jurisdiction over the parties and subject matter of this petition and grant to the petitioner such other and further relief in the premises as the rights and equities of the cause may require.

(e) And for such other and further relief in the premises as to the Court may seem meet.

Dated: —— — ——.

Joseph A. Padway, Counsel for Petitioners, 321 Tower Building, 14th & K Streets, N. W., Washington, D. C.

Copy received Sept. 29, 1938.

(Signed) Robert B. Watts, Assoc.-General Counsel, N. L. R. B.

[fol. 8] *Duly sworn to by William Green. Jurat omitted in printing.*

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of SHIPOWNERS' ASSOCIATION OF THE PACIFIC COAST, WATERFRONT EMPLOYERS ASSOCIATION OF THE PACIFIC COAST, THE WATERFRONT EMPLOYERS OF SEATTLE, THE WATERFRONT EMPLOYERS OF PORTLAND, THE WATERFRONT EMPLOYERS ASSOCIATION OF SAN FRANCISCO, THE WATERFRONT EMPLOYERS ASSOCIATION OF SOUTHERN CALIFORNIA, *and* INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, DISTRICT NO. 1

In the Matter of WATERFRONT EMPLOYERS ASSOCIATION OF SOUTHERN CALIFORNIA *and* INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 1–13

Cases Nos. R–638 and R–572, respectively.—Decided June 21, 1938

Longshoremen Industry—Employer: companies functioning through associations—*Investigation of Representatives*: controversy concerning representation of employees: controversy concerning appropriate unit; employer's refusal to grant recognition of union; necessity for designation of proper collective bargaining agency to facilitate negotiations for next contract-period—*Contract—Unit Appropriate for Collective Bargaining*: workers who do the longshore work in the Pacific Coast ports of the United States for the companies which are members of the employer associations herein involved; coast-wide; "employer" unit: meaning of; history of employer organization; organization of companies on coast basis, functioning of companies with respect to labor relations; history of collective bargaining relations with employer and in industry: failure of bargaining attempted on a local scale, successful bargaining on coast basis, present coast-wide agreement; desires of employees: visiting privileges, absorption of unemployed members; basic similarity of working rules; walking bosses excluded; differences in meaning of subclassifications of longshoremen in various ports—*Representatives*: proof of choice: comparison of employee lists and union cards—*Certification of Representatives*: upon proof of majority representation.

Mr. Bertram Edises, for the Board.

Gladstein, Grossman & Margolis, by *Mr. Richard Gladstein* and *Mr. Aubrey Grossman*, of San Francisco, Calif., for I. L. W. U., I. L. W. U. District No. 1, and I. L. W. U. Local 1–13.

Mr. Carey McWilliams, of Los Angeles, Calif., for I. L. W. U. Local 1–13.

Mr. Charles J. Katz, *Mr. John C. Packard*, of Los Angeles, Calif., and *Mr. W. J. Hull*, of Long Beach, Calif., for I. L. A. Local 38–82, Inc.[1]

[1] Katz and Packard were permitted to represent those interests in I. L. A. Local 38–82, Inc., which they represented in the proceedings in the Superior Court of the State of California, in and for the County of Los Angeles, entitled *Walker* v. *International Longshoremen's Association, Local 38–82, Inc.*, Number 420356. Hull was permitted to represent the adverse interests in I. L. A. Local 38–82, Inc.

Mr. Gregory Harrison, of San Francisco, Calif., for Shipowners' Association of the Pacific Coast, and members thereof listed in Appendix "B"; Waterfront Employers Association of the Pacific Coast, and members thereof listed in Appendix "C"; Waterfront Employers of Seattle, and members thereof listed in Appendix "D"; Waterfront Employers of Portland, and members thereof listed in Appendix "E"; Waterfront Employers Association of San Francisco, and members thereof listed in Appendix "F"; and Waterfront Employers Association of Southern California, and members thereof listed in Appendix "G".

Mr. A. H. Petersen, of Gardena, Calif., for the A. F. of L.

Mr. James F. Kennedy and *Mr. Lawrence Mallen*, of San Francisco, Calif., for I. L. A. Local 38–79.

Mr. Milton D. Sapiro, of San Francisco, Calif., for I. L. A. Local 38–79.

Mr. L. B. Sulgrove, of Tacoma, Wash., for I. L. A., I. L. A. Local 38–97, I. L. A. Local 38–89, I. L. A. Local 38–86, and I. L. A. Local 38–83.

Mr. Samuel DeGroot, of Los Angeles, Calif., for I. L. A. Local 38–82, Inc.

Mr. Joseph L. Searles, of San Francisco, Calif., for I. L. A. Local 38–79.

Mr. Martin Kurasch, of counsel to the Board.

DECISION

AND

CERTIFICATION OF REPRESENTATIVES

Statement of the Case

On January 29, 1938, after a hearing, the National Labor Relations Board, herein called the Board, issued a Decision and Order in a proceeding it had entitled Case No. XXI–R–325,[2] in which it remanded the proceedings for purposes of further hearing.[3] That proceeding had been based upon a petition filed by International Longshoremen's and Warehousemen's Union,[4] Local 1–13 alleging that a question affecting commerce had arisen concerning the representation of longshoremen of Waterfront Employers Association of Southern California in Los Angeles and Long Beach harbor and requesting an investigation and certification of representatives pursuant to Sec-

[2] Upon being transferred to the Board the designation of the case was changed to Case No. R–872.

[3] 4 N. L. R. B. 1109. That Decision contains a detailed statement of the pleadings and proceedings prior thereto.

[4] International Longshoremen's and Warehousemen's Union is herein called I. L. W. U.

tion 9 (c) of the National Labor Relations Act, 49 Stat. 449, herein called the Act.

On January 10, 1938, I. L. W. U. Local 1-46 filed with the Regional Director for the Twenty-first Region (Los Angeles, California) a petition alleging that a question affecting commerce had arisen concerning the representation of longshoremen employed by Waterfront Employers Association of Southern California in the Santa Barbara and Ventura harbor area and requesting an investigation and certification of representatives pursuant to Section 9 (c) of the Act. This proceeding was entitled Case No. XXI-R-421.

On January 19, 1938, I. L. W. U., District No. 1, filed with the Regional Director for the Twentieth Region (San Francisco, California) a petition alleging that a question affecting commerce had arisen concerning the representation of workers employed at longshore work in all the Pacific Coast ports of the United States. This proceeding was entitled Case No. XX-R-196.

On January 29, 1938, the Board issued, together with its Decision and Order in Case No. XXI-R-325, an Order Transferring Proceedings from the Twenty-first Region to the Twentieth Region, Consolidating and Directing Investigation and Hearing, by which Cases Nos. XXI-R-421 and XXI-R-325 were, in accordance with Article II, Section 37 (c), of National Labor Relations Board Rules and Regulations—Series 1, as amended, herein called the Rules and Regulations, transferred to and continued in the Twentieth Region. The proceedings transferred, and Case No. XX-R-196, were, in accordance with Article III, Section 10 (c) (a), of the Rules and Regulations, consolidated for purposes of hearing, and the Regional Director for the Twentieth Region was, pursuant to Section 9 (c) of the Act and Article III, Section 3, of the Rules and Regulations, ordered to conduct an investigation and to provide for appropriate hearings upon due notice.

On February 4, 1938, the Board permitted I. L. W. U. Local 1-46 to withdraw its petition and ordered, in accordance with Article II, Section 37 (c), of the Rules and Regulations, Case No. XXI-R-421 to be severed from Cases Nos. XXI-R-325 and XX-R-196.

On February 5, 1938, the Regional Director issued a notice of consolidated hearing, copies of which were served upon the parties.[1] Pursuant to the notice, a hearing was held in San Francisco, California, from February 15 through February 25, 1938, inclusive, and on March 25 and 26, 1938; in Los Angeles, California, on March 7, 1938; in San Pedro, California, from March 7, 1938, through March 9, 1938, inclusive; in Seattle, Washington, from March 14 through March 17, 1938, inclusive; and in Portland, Oregon, on March 18

[1] A list of the parties served is contained in Appendix "A".

and 19, 1938, before Walter B. Wilbur, the Trial Examiner duly designated by the Board. The Board, the Shipowners Association of the Pacific Coast, and members thereof named in Appendix "B", Waterfront Employers Association of the Pacific Coast, and members thereof listed in Appendix "C", Waterfront Employers of Seattle, and members thereof listed in Appendix "D", Waterfront Employers of Portland, and members thereof listed in Appendix "E", Waterfront Employers Association of San Francisco, and members thereof listed in Appendix "F", and Waterfront Employers Association of Southern California, and members thereof listed in Appendix "G", I. L. W. U., I. L. W. U. District No. 1, I. L. W. U. Local 1-13, and International Longshoremen's Association* Locals 38-97, 38-89, 38-86, and 38-79, were represented by counsel and participated in the hearing. A. H. Petersen appeared for the American Federation of Labor, herein called the A. F. of L., James F. Kennedy and Lawrence Mallen appeared for I. L. A. Local 38-79. Charles J. Katz and John C. Packard appeared for those interests in I. L. A. Local 38-82, Inc., which were associated with the Committee for Industrial Organization, herein called the C. I. O., and W. J. Hull appeared for those interests in I. L. A. Local 38-82, Inc., associated with the A. F. of L. Samuel DeGroot made a special appearance for I. L. A. Local 38-82, Inc., for the purpose of contesting the jurisdiction of the Board. Full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues was afforded all parties.

The A. F. of L., I. L. A., and I. L. A. Locals objected to the jurisdiction of the Board on the grounds that the existence of a contract between the employers and I. L. A. Pacific Coast District 38 deprived the Board of jurisdiction and that the Board had no power to designate a unit as one appropriate for the purposes of collective bargaining which was larger than the individual employer. The Trial Examiner overruled these objections to the jurisdiction of the Board. The I. L. W. U., I. L. W. U. District No. 1, and the I. L. W. U. Locals sought to introduce testimony as to the structure and formation of the Maritime Federation of the Pacific. Objections to the introduction of this evidence were sustained by the Trial Examiner. During the course of the hearing the Trial Examiner made several other rulings on motions and on objections to the admission of evidence. The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial errors were committed. The rulings are hereby affirmed.

* International Longshoremen's Association is herein called I. L. A.

On April 30, 1938, Gregory Harrison, counsel for the companies and associations, filed a brief with the Board at Washington, D. C.

Upon the entire record in the case, the Board makes the following:

Findings of Fact

I. The Business of the Companies

During the course of the hearing counsel for the Board read into the record the following stipulation:

> It is hereby stipulated between the National Labor Relations Board and the parties represented here by Mr. Gregory Harrison as follows:
>
> (1) That each individual company here involved, that is to say, each company listed herein as belonging to either the Waterfront Employers Association of the Pacific Coast, the Waterfront Employers of Seattle, the Waterfront Employers of Portland, the Waterfront Employers Association of San Francisco, or the Waterfront Employers Association of Southern California, is engaged in the transportation or handling of waterborne cargo.
>
> Two; that the longshoremen on whose behalf the petition in this case is filed, handle said waterborne cargo.
>
> Three; that more than 50 per cent of said cargo, at the time it is handled by said longshoremen, is in the course of transportation between States in the United States, or between the United States and foreign countries, or between the United States and non-contiguous territories or possessions of the United States.

The companies which are members of the Waterfront Employers of Seattle, Waterfront Employers of Portland, Waterfront Employers Association of San Francisco, and Waterfront Employers Association of Southern California, herein collectively called the regional associations, are either firms engaged in the transportation of cargo or passengers by water, stevedoring companies or, except in the case of Waterfront Employers Association of San Francisco, terminal operators.[1]

The companies which are members of the Shipowners' Association of the Pacific carry lumber from the Northwest ports and are engaged in the transportation of cargo in interstate or foreign commerce. Three members of the Shipowners' Association, Charles H. Higgins Company, Hobbs-Wall & Company, and Los Angeles and

[1] In the list of members of Waterfront Employers of Seattle, Board Exhibit No. 17, The Jordan Company appears under the classification "weigher".

San Francisco Navigating Company, transport cargo only between ports in the State of California, but the vessels of each of these three companies go outside the three-mile limit.

II. THE ORGANIZATIONS INVOLVED

International Longshoremen's and Warehousemen's Union is a labor organization affiliated with the Committee for Industrial Organization, admitting to its membership all workers engaged in longshore work. International Longshoremen's and Warehousemen's Union, District No. 1, has jurisdiction over the ports in Alaska, British Columbia, California, Oregon, Washington, and the Hawaiian Islands; each of its Locals has jurisdiction over one or more ports.

International Longshoremen's Association is a labor organization affiliated with the American Federation of Labor, admitting to its membership all workers engaged in longshore work. Pacific Coast District International Longshoremen's Association, Local No. 38, has jurisdiction over all the ports of the Pacific Coast north of the Republic of Mexico, and including the territory of Hawaii; each of its Locals has jurisdiction over one or more ports.

III. THE HISTORY OF BARGAINING

In 1909 the I. L. A. and several independent longshoremen's associations with which it had been competing in various ports on the Pacific Coast entered into an agreement providing for the establishment of Pacific Coast District International Longshoremen's Association, Local No. 38, of which all the local longshoremen's unions on the Pacific Coast became a part. The Pacific Coast District was given autonomy with respect to labor relations. No working agreement could be entered into by any of its component locals without the approval of the District, and it was agreed that no Local was to be chartered by the I. L. A. without the consent of the District. Between 1909 and 1934 the I. L. A. Pacific Coast District was unable to reach that state of organization which would have enabled it to act effectively as a unit on the Coast. Several local agreements with employers, made by the San Francisco Local and the Tacoma Local, were the total result of collective bargaining efforts. Longshoremen's strikes in San Francisco, in 1916 and 1919, were lost by the longshoremen. After the 1919 strike, the longshoremen, with the exception of the Tacoma Local, were unable to achieve any effective collective bargaining until 1934.

In February 1934 the San Francisco Local, opposed to plans to submit demands of the longshoremen to arbitration, called a convention of the I. L. A. Locals in the Pacific Coast District to take action

against these arbitration plans. The convention formulated certain demands and provided for the taking of a strike vote if the demands were not met by the employers. One of the principal points in the proposals of the convention was that there was to be one coastwide agreement rather than separate port agreements. Harry Bridges, now president of I. L. W. U. and of the I. L. W. U. District No. 1, testified that the longshoremen felt that the loss of the strikes in 1916 and 1919 was due to the lack of proper coast coordination among the longshoremen, which permitted the companies to play one port against the other.

After the employers had refused to accede to their demands, the longshoremen voted to strike on March 23, 1934. But on March 22 President Roosevelt appointed a Mediation Board and the contemplated strike did not take place. Hearings were held before the Mediation Board, and on April 3 an agreement was entered into between the San Francisco local and the Waterfront Employers' Union of San Francisco, an organization of companies operating in the San Francisco area, which provided for the recognition of the I. L. A. as the representative of the men in the port and for the negotiation of the wage differences. Negotiations on the wage question, however, were fruitless. The longshoremen reiterated their demand for a coast agreement, and on May 9, 1934, all the longshoremen on the Pacific Coast went out on strike. Within a week the seamen, boilermakers, and machinists had joined in the strike. Later the teamsters and licensed officers also struck.

On May 28 a proposal for settlement was made which provided that the employers in each of the ports of San Francisco, Los Angeles, Seattle, and Portland would recognize the I. L. A. as the representative of the longshoremen in those ports. This proposal was rejected by the longshoremen because it was not a coastwide agreement and because it did not provide a settlement for the other maritime unions on strike. On June 16 another proposal, signed by Joseph P. Ryan, president of I. L. A., and by one of the District officials, was rejected by a referendum of the longshoremen because it provided no settlement for the other maritime unions on strike. After June 16 a Joint Strike Committee was set up to coordinate the activities of the various maritime unions on strike and to replace the loose form of cooperation that had existed prior to this time. In the northwest ports a Northwest Joint Strike Committee was formed.

On June 26, 1934, President Roosevelt appointed a board, known as the National Longshoremen's Board, consisting of Archbishop Hanna, O. K. Cushing, and E. F. McGrady, to mediate the strike. This Board effectuated a settlement of the strike and the longshore-

men returned to work on July 31, 1934. The settlement provided that the issues in dispute which involved the longshoremen were to be submitted to arbitration and that, with respect to the other crafts on strike, collective bargaining negotiations were to be entered into if the maritime unions were found, after elections had been held, to represent a majority of the employees.

The National Longshoremen's Board, acting as an arbitration board, held hearings in various ports on the Coast. Melnikow and Kagel, of the Pacific Coast Labor Bureau, represented the longshoremen, and the employers were represented by Phleger. On October 12, 1934, an arbitration award, which constituted a series of agreements between the longshoremen and the regional associations of employers, was made. The Award set basic wage rates and hour provisions and provided for the establishment of jointly operated hiring halls. It was to be binding on all parties until September 30, 1935, and was to be automatically renewed from year to year unless written notice of the desire of any of the parties to terminate or modify the Award was given 40 days prior to its expiration date.

The Award was renewed in 1935 by virtue of the automatic renewal clause. In 1936 both parties gave notice of a desire to modify the terms of the Award. The longshoremen, in reopening negotiations, were motivated not only by a desire to effect certain amendments but also by the fact that they did not want to be so bound by the contract as to prevent their acting jointly with the other maritime unions if the latter decided that they wanted to change any of their working conditions. In September 1936 the Coast Negotiating Committee, consisting of representatives of the longshoremen and of the maritime unions, was set up to conduct negotiations with the maritime employers. This Coast Negotiating Committee, after failing to arrive at any understanding through collective bargaining negotiations, recommended to each union that a referendum be taken to empower their representatives on the Coast Committee to take strike action on October 28, 1936. On October 28 all the maritime unions simultaneously went out on strike. The Coast Negotiating Committee, during the period of the strike, was designated the Coast Policy Committee. An agreement terminating the strike was reached on February 4, 1937.

The agreement of February 4, 1937, nominally an amendment to the Award of the National Longshoremen's Board, contains an identical automatic renewal clause except that a 60-day period was set up within which to give notice of desire to terminate. The hiring of all longshoremen was to be through a hall maintained jointly by The Pacific Coast District of the I. L. A., and the employers' associations.

A Labor Relations Committee, composed of three representatives of the Employers Association and three representatives of the longshoremen, was to be set up in each port. The Labor Relations Committee maintains and operates the hiring hall, is in charge of the registration list of regular longshoremen from which the longshoremen assigned to work must be chosen, makes additions to the registered list, investigates and adjudicates all grievances and disputes relating to working agreements, decides all grievances relating to discharges, and in case of discharge without sufficient cause, may order payment for lost time or reinstatement with or without payment for lost time. It determines the organization of gangs and method of dispatching, and chooses the personnel of the hiring hall, with the exception of the dispatcher, who, under the agreement, is to be selected by the I. L. A. The agreement states that preference of employment is to be given to members of Pacific Coast District International Longshoremen's Association whenever available.

The agreement of February 4 provided for further negotiations with respect to rates on penalty cargo,[8] the maximum loads on slings which the longshoremen would have to handle, and safety provisions. No agreement has been attained with respect to a safety code, but an agreement as to penalty cargoes was reached on April 16, 1937, and an agreement as to maximum loads was reached on April 23, 1937. Several small locals rejected these agreements, but they were bound by the majority vote. Bridges testified that the longshoremen in San Francisco accepted the maximum loads agreement, which set standards of distinct benefits to longshoremen in ports other than San Francisco, even though the loads provided for were greater than the San Francisco longshoremen had had to handle previously.

The provisions of the agreement of February 4, 1937, and of the penalty cargoes and maximum loads agreements, are those in effect at the present time. The contracts are more fully discussed in Sections IV–VII below.

IV. THE HISTORY OF I. L. W. U.

Early in 1937 many I. L. A. locals passed resolutions in favor of, and pledges of support and sympathy for, the C. I. O. Prior to the annual convention of the Pacific Coast District of the I. L. A., Bridges, a president of the District, and the other District officers, circulated a report among the various locals which recommended that the District support the C. I. O., and that a referendum of the

[8] Penalty cargo is that cargo, which, because of the danger or discomfort or difficulty in handling, entitles the longshoreman to greater pay.

International organization on the question of supporting and affiliating with the C. I. O. be held. It was intended that the report be discussed in the locals, and that the delegates to the convention from the various locals be instructed on this issue.

The District Convention, meeting in Seattle in May, 1937, adopted Bridges' report, and took the further action of recommending to its locals that they refuse to pay any assessment to the International which would be used to fight the C. I. O. and of deciding that a referendum would be taken to see how far the District would go in such refusal.*

The longshoremen believed that the A. F. of L. Executive Council, in its meeting at Cincinnati in June 1937, had decided upon extra assessments from its international unions for the purpose of fighting the C. I. O., and that Ryan had agreed that the I. L. A. would pay this extra assessment. Communications were sent to Ryan asking if he had taken the position that he was willing to pay the extra assessment. The communications were not answered.

At this time the Maritime Federation, with which the Pacific Coast District and other maritime unions were associated, held its convention at Portland, Oregon. Since the convention in February 1935, the I. L. A. delegates to the Maritime Federation conventions had been designated the I. L. A. caucus. On occasion, representatives of the I. L. A. International had met with the caucus. The I. L. A. caucus, after the failure of Ryan to reply to the communications sent him concerning the extra assessments, decided to adopt the recommendation of the Maritime Federation Convention that each of its member unions hold a coastwise referendum to determine whether or not their members wished to become affiliated with the C. I. O., and, on June 14, blank ballots providing for a vote on the question of affiliating with the C. I. O. and the question of returning the defense fund, which was not very large at the time, were sent to the locals. The American Radio Telegraphists' Association and the Marine Engineers' Beneficial Association, both members of the Maritime Federation, had, at this time, already become affiliated with the C. I. O.

The results of the vote among the members of the Pacific Coast District of the I. L. A. were 11,771 in favor of affiliating with the

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* The resolutions, under the heading "Unity of the Labor Movement and the C. I. O." read "RESOLVED: In the event any assessment is levied by the AFL and any attempt is made to collect from locals such assessment, the purpose of which is to carry on a fight against any bona fide group, either nationally or locally, we request unions refuse to pay such assessments and entire District organization back up any local who may be disciplined because of their stand, and be it still further

"RESOLVED: That our District officials and Executive Board stand instructed to take a referendum ballot to determine to what extent we will go in our refusal."

C. I. O. and 3,625 opposed to affiliation;[10] the longshoremen's vote was 7,073 in favor of affiliating with the C. I. O. and 2,263 opposed.[11]

On July 18, 1937,[12] the District Executive Board[13] met at Seattle, Washington. They approved the taking of the referendum by the I. L. A. caucus and instructed the officers to apply to the C. I. O. for a charter. They decided that they would operate with the same officers and the same Executive Board, that the District and the several locals would function as previously under their existing constitutions, and that the Executive Board should revise the District Constitution in so far as that was made necessary by the new affiliation.

On July 18, 1937, the Executive Board authorized the officers to apply for a C. I. O. charter, and Ryan was informed of this on July 19.

On July 22, 1937, the following letter, together with a blank form of application for an International Longshoremen's Association charter, was received by the Pacific Coast District Locals:

To All Pacific Coast District Locals, I. L. A.

Dear Sirs and Brothers: President Harry Bridges of the Pacific Coast District has notified our International Association that the Pacific Coast District membership is seceding from our International Organization to join the group known as the C. I. O.

Naturally, the majority rules, but the experience of the Pacific Coast longshoremen in the past has been that by following radical leadership they have had to leave it to the Atlantic Coast District membership to set their wages, and with the exception of the port of Tacoma (where they remained loyal to our International Association) they have had nothing to say about their condition.

We, therefore, feel that any ports that wish to remain loyal to our International should do so, and that any group in any port should be permitted to retain their affiliation with the I. L. A. Charters will be issued to these minority groups in each port who wish to make application for same, and those who wish

[10] The Pacific Coast District of the I. L. A. contained classes of workers other than longshoremen. It included warehousemen, checkers, scalers and miscellaneous employees such as watchmen, gatemen, shipping clerks, etc.

[11] This includes the vote of several small locals in Hawaii and in Alaska.

[12] At this time the vote had not yet been completed. In a letter dated July 16, 1937, Meehan stated that the vote among the members of the Pacific Coast District was 11,441 in favor of C. I. O. affiliation and 3,349 opposed to such affiliation.

[13] This was a "lame duck" Executive Board. A new Executive Board had been regularly voted for by the I. L. A. membership but the votes had not yet been counted.

to remain in a body can return their present serial charters and direct charters will be issued.

We request that you give this serious consideration, as I understand that the other marine organizations on the Pacific Coast are not going to affiliate with the C. I. O.—The Teamsters are remaining loyal to the American Federation of Labor and the Longshoremen may again find themselves alienated from the rest of the labor movement.

We guarantee the entire backing of the International Longshoremen's Association to the membership who wish to remain loyal to us.

Fraternally yours,

(s) JOSEPH P. RYAN,
International President.

On July 30, 1937, Almon E. Roth, President of Waterfront Employers Association of the Pacific Coast, sent a letter to Bridges, addressed as President of International Longshoremen's Association, Local No. 38, in which it was stated that the Waterfront Employers Association of the Pacific Coast would not give notice of modification or termination of the February 4 agreement, which would be automatically renewed at midnight, July 31, 1937.

On the same day, Bridges sent the following reply:

SAN FRANCISCO, CALIF., *July 30, 1937.*

Mr. ALMON E. ROTH, *President,*
Waterfront Employers' Association of the Pacific Coast,
215 Market Street, San Francisco, California.

DEAR SIR: This will acknowledge receipt of your communication of July 30, 1937, expressing intention of not giving notice of modification or termination of existing agreements and thereby automatically renewing them for another year.

We hereby advise you that it is not our intention to give notice of modification or termination of existing agreements and that therefore they will be automatically renewed for another year.

We note the change of your designation to Waterfront Employers' Association of the Pacific Coast. Please be advised that by action of our Executive Board in compliance with the vote of our membership we have likewise changed our name to International Longshoremen's and Warehousemen's Union.

Yours very truly,

(Sgd.) H. R. Bridges:
H. R. BRIDGES, *President.*

A C. I. O. charter was received on August 11, 1937. On September 10 and 11, the Executive Board met at San Francisco. They decided

that the name "International Longshoremen's and Warehousemen's Union" would be adopted, that the body would become the "Executive Board of the International Longshoremen and Warehousemen's Union", that they would dissociate themselves from District 38 of the I. L. A. and the International, that the District would become known as District No. 1, I. L. W. U., and that charters would be issued to the various locals. They agreed to be bound by the decisions of the last and previous I. L. A. conventions.

From August 24, 1937, on, all the locals of longshoremen with the exception of four, applied for charters from the I. L. W. U. District. The four exceptions were the Tacoma, Olympia, Port Angeles, and Anacortes locals, all in the Puget Sound area. At the present time, there are about 10,575 Pacific Coast longshoremen in the locals that are a part of I. L. W. U. District No. 1, and about 904 longshoremen in the locals that have remained with the I. L. A.[14]

The Tacoma local, on September 7, 1937, set up a committee of six to coordinate their efforts to stay in the I. L. A., and to maintain themselves as the I. L. A. District. The committee called an "emergency convention" at San Francisco on September 20 or 21, 1937, at which time officers were chosen; most of the old officers now were the officers of the I. L. W. U. The emergency convention instructed Calkins, who had been elected secretary-treasurer, to send a letter to the employers letting them know that I. L. A. District No. 38 was still in existence and asking them to do business with it. Such a letter was sent, but an answer was never received.

The emergency convention also passed a motion to the effect that they would operate under the International constitution. No mention was made of the District constitution.

V. THE HISTORY OF THE EMPLOYER ASSOCIATIONS

Melnikow, of the Pacific Coast Labor Bureau, testifying as an expert for I. L. W. U., and Thomas G. Plant, vice president of the American-Hawaiian Steamship Company, both stated that basic wages and hours of work for longshoremen on the Pacific Coast had been uniform since 1922. Melnikow attributed this to close cooperation between the employers of longshore labor on the Coast.

There have been associations of employers of longshore labor in Seattle since 1908, in San Francisco since 1914, in Portland since 1921, and in San Pedro since 1923. In 1934, they were organized in four regional associations, Waterfront Employers of Seattle, Waterfront Employers of Portland, Waterfront Employers' Union of San Francisco, and Marine Service Bureau of Los Angeles. Only a very

[14] There are approximately 23,324 workers in all the locals that constitute a part of I. L. W. U. District No. 1, and 1,609 workers in locals that have remained in the International Longshoremen's Association.

small percentage of those companies which use longshore labor are not members of the various associations, and no large company is not a member.

A committee consisting of representatives of the four associations was formed during the 1934 strike, and carried on the negotiations with the longshoremen which finally resulted in the October 12, 1934 Award of the National Longshoremen's Board. The Award was in the form of one document that was stated to be "a series of agreements between the International Longshoremen's Association, acting on behalf of various Locals whose members perform longshore labor," on the one hand, and each of the regional associations, separately, on the other hand.

Marine Service Bureau of Los Angeles subsequently became Waterfront Employers Association of Southern California, and Waterfront Employers' Union of San Francisco became Waterfront Employers Association of San Francisco. Waterfront Employers Association of Southern California includes the employers in the ports of Los Angeles, San Pedro, San Diego, Santa Barbara, Ventura, and other ports in that vicinity. Waterfront Employers Association of San Francisco covers the San Francisco Bay region through the northern part of California. Waterfront Employers of Portland includes the Oregon and Columbia River ports, and Waterfront Employers of Seattle includes the ports of Washington, excluding the ports on the Columbia River.

In May 1935 Francis P. Foisie was given the task of coordinating the activities of the four regional associations and was entitled Coast Coordinator. Foisie testified that it was the general understanding among the members of the associations that as long as they remained members they could not enter into individual agreements with longshore unions.

In the spring of 1936, representatives chosen by the regional associations met at San Francisco. A committee appointed by this conference recommended to the whole group:

1. That the Committee appointed by the Conference and subsequently confirmed by the above-mentioned associations, be continued as the Committee.

2. That the Committee be known as:

The Coast Committee for the Shipowners acting on behalf of Waterfront Employers Association of Southern California, Waterfront Employers Association of San Francisco, Waterfront Employers of Portland, Waterfront Employers of Seattle.

3. That the Committee be authorized to act exclusively in behalf of the four Associations of Waterfront Employers in connection with or by reason of the pending expiration of their contracts with the Pacific Coast District of the International Long-

shoremen's Association, including the determination and execution of all matters relating to negotiation of new labor contracts, or termination, or renewal, or modification of existing contracts, and the settlement of any and all disputes that may arise in connection therewith.

. . . . . .

6. That the Committee shall work toward one basic settlement of the matters relating to the four Associations of employers of longshore labor.

The recommendations were adopted and ratified by the four associations, and the Coast Committee, consisting of T. J. Plant, T. B. Wilson, John Walsh, E. T. Ford, W. P. Bannister, Hugh Gallagher, and Joseph J. Lunny, was set up.

Shortly after it was formed, the Coast Committee gave notice to the I. L. A. Pacific Coast District that they desired amendments to the contract which would have renewed itself on September 30, 1936. The Union gave a similar notice. The Coast Committee then took charge of negotiations with the longshoremen, and, after the 1936–1937 strike, reached the agreement of February 4, 1937, which was an agreement between Pacific Coast District, Local 38 of the International Longshoremen's Association, and the Coast Committee for the shipowners, on behalf of the four associations.

In June 1937 an association known as Waterfront Employers Association of the Pacific Coast was created. Almon E. Roth, president of the Association, testified that the Coast Committee had felt that the renewal and execution of new contracts would call for some central agency which would assume the same function which had been performed by the various port associations, and that the Coast Association was formed for that purpose. Harrison, counsel for the Association, testified that it was an association of those engaged in the shipping business created for the purpose of formulating labor policies up and down the Pacific Coast in connection with longshore labor and other matters in which they were interested. He stated that the prime emphasis was on labor policy.

Waterfront Employers Association of the Pacific Coast includes in its membership voting members, which are firms "regularly engaged in carrying cargo by water to and from any port on the Pacific Coast of the United States (except Alaska ports) or any agent designated by such firm . . .," and associate members, which are firms "employing longshoremen or other shore employees in any port on the Pacific Coast of the United States." Voting power is restricted to the voting members.[15]

[15] Voting power is distributed among the voting members in accordance with the tonnage of cargo handled by such member in the preceding calendar year.

Officials of the Association stated that, although all of the shipping companies, included in the first class of membership, require longshore labor for their operations, few of them hire longshore workers directly;[16] the necessary longshore work is, in the greater number of instances, done by the stevedoring companies, which constitute the associate member class. It was the contention of counsel for the employers that, because of this fact and because the regional associations can act independently in matters involving longshore labor, Waterfront Employers Association of the Pacific Coast is not closely concerned with the negotiation of agreements concerning longshore labor on the Pacific Coast or with the terms of employment of longshore labor except in so far as it acts as a clearing house for information for the regional associations.

It is clear, however, that both the shipping companies and Waterfront Employers Association of the Pacific Coast are intimately associated with the employment of longshore labor and the negotiation and execution of agreements concerning longshore labor.

The Coast Committee for the shipowners, which negotiated the agreement of February 4, 1937, consisted of seven men, only one of whom was a representative of a company that regularly employed longshore labor. The list of members of the regional associations which is attached to the February 4 agreement for the purpose of indicating what companies were represented, contains the names of the shipping companies, and section 1 of the agreement contains the following paragraph:

> It is agreed and understood that if the employers, parties to this agreement shall sub-contract work as defined herein, provision shall be made for the observance of this agreement.[17]

The Amended Articles of Incorporation of Waterfront Employers Association of the Pacific Coast, in stating the purposes of the Association, refers generally to members without distinguishing between voting and associate members:

> ARTICLE II
>
> The said corporation is one which does not contemplate pecuniary gain or profit for its members and is formed for the following purposes and objects:
>
> 1. To encourage the establishment and maintenance of fair and reasonable wages and working conditions for longshore work

[16] The statement may be misleading, in that the record does not indicate the percentage of the longshore work on the Pacific Coast, in terms of tonnage, that is performed by the longshoremen hired directly by these companies.

[17] Section 3 of the Amended Articles of Incorporation, quoted below, also refers to contracts between members of the Association and other employers in matters relating to the employment of longshoremen.

and other work ashore relating to steamship service and, by the establishment and maintenance of harmonious and peaceful industrial relations between employer and employee, to promote dependable and efficient steamship service in the public interest;

2. To fix, establish and maintain on behalf of its members policies in all matters relating to longshore work and other employments ashore at Pacific Coast ports of the United States (except Alaska ports);

3. To represent its members and others in matters relating to the employment of longshoremen and other shore employees at said ports including the negotiation, execution and performance of contracts with other employers or groups thereof and contracts with groups or associations of longshoremen and other shore employees governing wages, hours and conditions of such employment;

4. To assist, represent and act in behalf of the members and others in connection with any violations of agreements relating to longshore or other employments ashore at said ports, to the end that all such agreements shall be faithfully performed by all parties thereto;

. . . . . .

The bylaws provide that the regional associations shall each be entitled to designate two representatives, one to be selected for knowledge of stevedoring, the other for knowledge of terminal or dock operation. These representatives are to attend meetings of the Board of Directors of the Coast Association, although they do not have any voting power. The bylaws provide that members are bound by contracts entered into by the Coast Association unless they resign within 7 days after the vote on the contract.[16] The bylaws also provide that:

ARTICLE XVIII

SECTION 1. This corporation shall have power to establish policies for its members and the corporation in all matters relating to labor contracts and labor controversies and shall have power to represent and act on behalf of its members in any negotiations carried on by the corporation on behalf of its members with unions of longshoremen or other employments ashore and, subject to the provisions of Article V of these by-laws, any contracts, commitments or undertakings made by this corporation on behalf of its members with any union shall bind the members of this corporation. . . .

[16] By-Laws—Article V.

SEC. 2. If any union, its members or officials, shall violate any labor contract or award relating to wages, hours or working conditions to which agreement or award this corporation or any of its members is a party, whether by strikes, stoppages of work or in any other manner, any member affected thereby shall notify the corporation. . . . If compliance is not secured, a meeting of the members of this corporation shall forthwith be called and all members of this corporation shall take whatever action shall be determined by a vote of members holding at least a majority of the voting power of the membership, provided that there shall be no suspension or termination of any such contract or agreement for breach thereof without the consent of members representing at least two-thirds of the voting power of the entire membership. Provided further that written notice of any such vote or consent shall be immediately given by registered mail to all members and no such vote or consent shall bind any member who did not join therein and who resigns within seven days after the date of mailing of such notice.[19]

In July 1937 the following resolution was adopted by the four regional associations:

Be it hereby resolved, that the Waterfront Employers Association of the Pacific Coast, a nonprofit corporation, be, and the same is, hereby authorized on behalf of this association, and as its act and deed, to act in all matters relating to the expiration of pending contracts between this association and the International Longshoremen's Association or any Local thereof, including the determination and execution of all matters relating to the negotiation of new labor contracts or termination or renewal or modification of existing contracts and the settlement of any and all disputes that may arise in connection therewith.[20]

It should be noted that this language closely parallels the language in the recommendations which led to the setting up of the Coast Committee.

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[19] With regard to cooperation in strikes, the bylaws provide that:

If any labor union or association of working men or any members of any such union or association shall violate any agreement with this corporation, or with any member thereof, or shall refuse to work for any member or members of this corporation, the Board of Directors shall, upon application, cause investigation to be made, and if the Board of Directors shall find that such union or association is at fault, and fails or refuses to make reparation or otherwise remedy such violation or refusal to the satisfaction of the Board of Directors, and if this corporation after investigation shall desire to resist the demands of such union or member thereof, this corporation shall render to such member or members of this corporation the fullest moral support, and shall pay such expenses incurred by such member in any strike, lockout or other labor trouble caused by such action of the union, association or member or members thereof, as shall be approved and limited by the Board of Directors of this corporation in advance. . . .—Article XX.

[20] Roth testified that, as far as he knew, this authorization has never been revoked.

The letter of July 30, 1937, referred to above, indicating that the employers wished to let the February 4 agreement renew itself, was signed by Roth, president of Waterfront Employers Association of the Pacific Coast, on behalf of the four regional associations.

Grievances and ordinary disputes are usually referred to the Labor Relations Committee of the port. In the small ports in the Northwest, however, the employers generally have one man to represent them. This representative takes care of routine questions. If, however, a dispute of any importance occurs, two more representatives are sent by the Association involved, and they, together with the local representative, act as the employers' committee to deal with the dispute.

In cases where the dispute is of some importance, either because it is in a large port, or because it involves a problem of general application, the local Labor Relations Committee will be advised in the matter by Waterfront Employers Association of the Pacific Coast or by the regional association. Foisie, who, since the creation of the Coast Association, has been acting as assistant to Roth, has on occasion gone into the port to assist in the settlement.

When the dispute threatens a stoppage of work, Roth or Foisie or other officials confer with Bridges or Meehan, secretary of I. L. W. U. District No. 1, or other District officials, in an attempt to reach a settlement. The record contains a large number of communications from Roth to Bridges and to Meehan, all dealing with unsettled disputes. Both Bridges and Meehan testified as to other communications, telephone conversations, and personal conferences.

Thus, in actual practice, matters of importance are referred to Roth's office.[21] Before the formation of the Coast Association, they were referred to the office of Foisie, Coast Coordinator, or Gregory Harrison, counsel for the companies. The history of the formation and actual operation of the various associations of companies on the Pacific Coast convinces us that, with respect to longshore labor, these companies function entirely through the regional associations and through Waterfront Employers Association of the Pacific Coast, and that the regional associations operate as a closely integrated unit.

The Shipowners Association of the Pacific Coast is an association of owners and operators of steam schooners which are engaged in the carrying of lumber from the Northwest ports. There is a supplementary agreement, between International Longshoremen's Association, Pacific Coast District No. 38 and the Shipowners Association,

[21] Roth is president of Waterfront Employers Association of the Pacific Coast, Waterfront Employers Association of San Francisco, and of Pacific-American Shipowners' Association, an organization of American-owned lines having their principal ports on the Pacific Coast and organized for the purpose of representing its members in connection with labor matters relating to off-shore as distinguished from on-shore labor. The three Associations occupy the same offices in the Federal Reserve Building in San Francisco.

attached to the February 4, 1937, agreement, which provides that all the provisions of that agreement are to apply to the signatories, except the provision defining the scope of longshore work. The crews on these steam schooners usually do some of the work ordinarily classified as longshore work and the steam schooner operators did not want to be bound by the provisions of the agreement with respect to that portion of the longshore work done by the crews.

Plant stated that the negotiations for the supplementary agreement were carried on separately. He testified, however, that in the negotiations terminating the 1936–1937 strike, the Coast Committee broke themselves up into sub-committees. The negotiations for the Shipowners Association were, according to Plant, carried on by Lunny, a member of the Coast Committee, and Ralph Myers, president of the Shipowners Association. Bridges testified that Plant did most of the talking for the Shipowners Association of the Pacific. Lunny, though a member of the Coast Committee, spent most of his time on steam schooner affairs. Finally, there was a joint conference and the agreement and supplementary agreement were entered into.

It will be noted that the supplementary agreement merely serves to except steam schooners from one provision of the main agreement. In all other respects, the individual companies which are members of the Shipowners Association are affected in the same manner as are the companies belonging to the regional associations.

Longshoremen are hired in the same manner and on the same terms; disputes go through the same Labor Relations Committee in the port; and when a settlement cannot be reached the matter is referred by the companies to Bridges. Lunny and Myers are members of the Board of Directors of Waterfront Employers Association of the Pacific Coast. The record contains evidence of a letter on the letterhead of the Waterfront Employers Association of the Pacific Coast, dated April 7, 1937, addressed to E. S. Coates, manager of the Waterfront Employers Association of Portland and signed by F. T. Foisie with the notation that copies were to be sent to A. E. Roth and Ralph Myers. The letter concerns a dispute in the operation of a steam schooner. Roth stated, when questioned about this letter, that the Waterfront Employers Association of the Pacific Coast advises the Shipowners Association in matters concerning labor policy. It is evident that the labor relations of the members of the Shipowners Association of the Pacific Coast are handled in the same manner and through the same agencies as are the labor relations of the members of the regional associations.

VI. THE APPROPRIATE UNIT

In its petition for investigation and certification of representatives I. L. W. U. District No. 1 asserts that the unit most appropriate for

the purposes of collective bargaining consists of all the workers employed at longshore labor in the Pacific Coast ports of the United States. It is the contention of the companies that the appropriate bargaining unit for longshoremen must be one restricted to those longshoremen in the employ of a particular employer at a particular Pacific Coast port.

The history of bargaining and the history of employee organization, as set forth in previous sections, are completely persuasive of the fact that a unit including all the workers employed at longshore labor in the Pacific Coast ports of the United States is the one that will insure to employees the full benefit of their right to self-organization and to collective bargaining, and will otherwise effectuate the policies of the Act.

Particularly, the failure of the longshoremen to achieve any satisfactory collective bargaining agreements when the bargaining was on a local scale is to be contrasted with the highly successful collective bargaining achievements when the longshoremen bargained as a coast unit. From 1934 on, the longshoremen have rejected proposed agreements which were not coast-wide in scope, have bargained as a coast unit, and have been working under one coast-wide agreement. In dealing with the employers, the longshoremen have done so through the District, as has been shown.[22]

In dealing with the employers, the longshoremen have cooperated with the other maritime crafts and with the crew personnel. The proposals of May 28, 1934, and June 16, 1934, were rejected by the longshoremen because they did not provide a settlement for the other group on strike. The Joint Strike Committees in 1934, the Coast Negotiating Committee and the Coast Policy Committee in 1936, and the existence of the Maritime Federation of the Pacific, all bear witness to the identity of interest and the method of cooperation of the longshoremen and the other maritime groups. These maritime unions, including the American Radio Telegraphists' Association, the Marine Engineers Beneficial Association, the Marine Cooks and Stewards of the Pacific, and West Coast Local No. 90 of the Masters, Mates and Pilots of America, are organized on a coast basis, and the longshoremen have found that in order to work effectively with them, they too had to organize on a coast basis.

The history of collective bargaining and of the organization of the longshoremen, and the sacrifice of some of the longshoremen on the maximum loads agreement, are ample evidence of their desire for a coast unit. Several clauses in the I. L. W. U. constitution are

[22] Further, convention rulings decree that the locals are not to enter into separate port agreements. Respondent Exhibit No. 13 lists many port agreements, but almost none of them involve the longshore locals.

also indicative of the desires of the longshoremen in this regard. Thus Article XIII reads:

> SECTION 1. When any I. L. W. U. local is forced to dissolve due to its membership being thrown out of work by the ceasing of the sole source of employment, the locals of the Sub-district in which the dissolved local is located will be required to accept the unemployed members on a pro rata basis, provided that if the Sub-district locals cannot absorb said members, they will be divided pro rata amongst the locals of the same craft of District 1.

Under this clause, longshoremen from the ports of Stockton and Garibaldi are now working in other ports. Article XVIII,[28] which provides that any longshoreman in the District may obtain a visiting card which will give him work privileges in a port other than his own, for a period of 30 days, also shows the feeling of identity of interest among the longshoremen.

Action by the longshoremen, if it is to be effective, must be concerted and coordinated. At the present time, sympathy among the longshoremen is such that, in the absence of other factors, they will refuse to work ships diverted from a port in which there has been a lock-out. Unless the longshoremen's activities are completely integrated, therefore, there will be disorganized strikes. Bridges stressed the fact that such strikes must be avoided by the longshoremen, if they are to keep their organization. To this end, the District officials, in April 1936, ordered the longshoremen to work ships diverted from San Francisco, where there had been a lock-out, and, in January 1938, the I. L. W. U. officials ordered the working of ships diverted from Seattle, where there had been a lock-out. The lessons of the disastrous local strikes in 1916 and 1919 have brought home to the longshoremen the fact that action that is not coast-wide will result in a harmful set-back to their self-organization.

The companies contend that the working rules differ in various ports, and that that is indicative of the impropriety of a coast unit. It must be noted, however, that wages, hours, methods of hiring, methods of settling grievances, payment for penalty cargoes, and maximum sling loads are uniform on the Pacific Coast. There are

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[28] Article XVIII reads:

SECTION 1. Any member of District 1 so desiring may procure from his local secretary a visiting card showing that he is paid up to date and in good standing, which will entitle him to the following privileges in any local of the District of a similar craft.

SECTION 2. Work privileges accorded to a local member shall be for a period not to exceed thirty days unless agreeable to the local being visited.

SECTION 3. All locals of the District shall be required to accept a minimum of visitors of one per cent of their membership, but no local should be visited more than once a year by any one member unless agreeable to local so visited.

divergences in working rules only in minor matters. Thus, for example, the longshoremen in the San Francisco area are paid for their "travelling-time," which is the time spent travelling across San Francisco Bay to their work, if that is necessary. Other differences in working rules among the ports may be due to differences in cargo handled. Even in these minor matters, the drive is for uniformity among the ports. Thus in the Northwest the longshoremen have a committee to meet with the companies and to decide upon working rules for the longshoremen in the locals on Puget Sound, including the Aberdeen and Grays Harbor locals. This committee consists of representatives from the I. L. A. Locals in that area, as well as from the I. L. W. U. locals. Similarly, in the Columbia River area, the negotiations, carried on in Portland, are on a regional basis.

Since the essential working rules are on a coast-wide basis, and since port differences occur only in nonessential matters, the argument against a coast unit, based on working rules, does not carry much weight. This is especially true when it is considered that the working rules are determined upon, in the main, by the Labor Relations Committees which are set up by the coast-wide agreement.

The numerous factors which have been pointed to as indicating that the coast unit is the one which will best insure to the longshoremen the full benefit of their right to self-organization and to collective bargaining, are all reflections of the organization of the employers. The history of bargaining and of the longshoremen's organizations is a vivid portrayal of the experiences of the longshoremen as they learned that, since their employers were acting together on a coast basis, they, too, would have to build a coast organization which would parallel the organization of the employers. The desires of the men for a coast unit are the result of their failures when they acted on a port basis, and their success when they acted with their fellow longshoremen on the coast. The imperative need of the longshoremen for the coast unit and the dangers of smaller units arise because the companies on the Pacific Coast which use their labor are organized on a coast basis.

We have set out in some detail the history of the organization of these companies and we have considered the present set-up of the four regional associations, Shipowners Association of the Pacific Coast, and Waterfront Employers Association of the Pacific Coast. The organization of the employers is another important factor which militates toward the conclusion that the coast unit is the one most appropriate for purposes of collective bargaining.

It is contended that the Board has no jurisdiction to go beyond the individual company in deciding upon an appropriate unit of employees. The Board, however, is expressly given the authority to decide that the "employer" unit is the unit most appropriate for purposes of collective bargaining. The Act includes within the term *employer*

"any person acting in the interest of an employer, directly or indirectly," and the term *person* "includes one or more . . . associations . . ."

We have, in our examination of the functioning of the regional associations, pointed out how the associations engaged in collective bargaining for the individual companies, how the associations took charge of the operation and execution of the agreement, and how they dealt with the longshoremen in all matters involving labor relations. Indeed, the contract so regulates the hiring, dispatching, conditions of work, payment for work, and method of settling grievances, that the individual company can be said to exercise very few of the functions which are the essential attributes of the employer-employee relationship. The regional associations clearly act in the interest of these various companies. We have also shown the close articulation between the regional associations, effected by Waterfront Employers Association of the Pacific Coast, and the fact that, in actual practice, the existence of the Coast Association resulted in the regional associations' acting through the Coast Association as an integrated unit. What has been stated as applicable to the various regional associations is substantially true of Shipowners Association of the Pacific Coast.

We find that the workers who do the longshore work in the Pacific Coast ports of the United States for the companies which are members of Waterfront Employers of Seattle, Waterfront Employers of Portland, Waterfront Employers Association of San Francisco, Waterfront Employers Association of Southern California, and Shipowners Association of the Pacific Coast constitute a unit appropriate for the purposes of collective bargaining and that said unit will insure to these workers the full benefit of their right to self-organization and to collective bargaining and otherwise effectuate the policies of the Act.

F. T. Foisie testified that the term "longshoremen" quite frequently includes everyone who works either on board ship or on the docks, but that in the various ports there may be subdivisions of longshoremen, dock workers, grain handlers, etc. The exact meaning of these latter categories and the type of work which the men in these categories handle, varies from port to port. The type of work which the individual longshoreman does may also vary. The categories "permit men" and "casual men" also have different meanings in the various ports. It will be necessary, therefore, to discuss by individual ports the groups of men which we conclude are to be comprehended in the term "longshoremen." This will be done in Section IX below.

The walking boss is the individual who has general supervision over the loading and discharging of the entire ship. The I. L. W. U.

desires to have the walking bosses included in the unit; the majority of the walking bosses are Union members. The I. L. A. had a separate local for walking bosses but the I. L. W. U. refuses to charter such a local. Walking bosses are not dispatched or hired through the hiring hall, they follow the ship, except in the case of small companies, where the walking boss is on an hourly basis and may be in the employ of more than one company. Walking bosses have memoranda of understanding with the individual company, not with the employers' associations. Because of this difference in their relations with employers, walking bosses are not to be considered as within that category of longshoremen which constitutes the appropriate unit defined above.

VII. THE QUESTION CONCERNING REPRESENTATION

Gregory Harrison, counsel for the companies, testified that the letter of July 30, 1937, from Roth to Bridges, in which it was stated that Waterfront Employers Association of the Pacific Coast would not give notice of a desire to terminate the agreement, and the reply of the same date, in which Bridges stated that the longshoremen, too, wanted to renew, and in which he noted the new name "Waterfront Employers Association of the Pacific Coast," and stated that "by action of our Executive Board in compliance with the vote of our membership we have likewise changed our name to International Longshoremen's and Warehousemen's Union," were both put into a circular which was mailed to all members of the associations. The letters were widely commented upon by the newspapers on the Coast. At this time, the referendum had been taken, the July 18 meeting of the Executive Board at Seattle had been held, the C. I. O. charter had been applied for, and only a few formal steps remained before the change of affiliation would be completely effected. Thus, the employers were permitting the agreement to renew itself when they had full knowledge of the situation among the longshoremen and knowledge that they were now dealing with the I. L. W .U.

And in the execution of the contract the employers have been constantly dealing with the I. L. W. U., for it is the I. L. W. U. which has been taking care of the detailed performance of the contract, except in the case of the four Puget Sound ports which voted against affiliation with the C. I. O. The longshoremen who work the cargo on the ships and docks are I. L. W. U. members. The hiring halls from which the longshoremen are dispatched to the work are maintained jointly by the employers and the I. L. W. U.; the Labor Relations Committees, which operate the hiring halls and which settle disputes, consist of representatives of the regional associations and representatives of the I. L. W. U. Thus in San Francisco, for

example, employer members of the Labor Relations Committee, appointed by the executive members of Waterfront Employers Association of San Francisco, have been regularly meeting and working with the I. L. W. U. representatives on the Committee. The dispatchers in the hiring halls are all I. L. W. U. men. Preference of employment is given to I. L. W. U. men. The union to which the employers file complaints against individuals for violation of the agreement is the I. L. W. U., and the union which penalizes the individual longshoremen for such violation, as provided for in the agreement, is the I. L. W. U. In important disputes, Roth and Foisie contact Bridges and Meehan, the president and secretary of the I. L. W. U. The I. L. W. U. has, in effect, completely taken over the contract, and the employers have, in actual fact, acquiesced and have joined with the I. L. W. U. in the execution of the contract.

But the associations and companies have refused to give formal recognition to the I. L. W. U. Their communications to Bridges and Meehan, in 1937, have been addressed to these two in their former capacities as I. L. A. officials, although on at least two occasions,[24] they have been asked to send communications to the International Longshoremen's and Warehousemen's Union. At the present time, they address their communications to Harry Bridges, without any further designation, at an address on Market Street, San Francisco.

Occasionally, there are lapses. Thus, checks for the support of the hiring halls in San Francisco, which are drawn on the account of the Labor Relations Committee, have two lines for signatures, under one of which is printed "WEA of SF" and under the other is printed "ILW 1-10." The record also contains a telegram, dated March 10, 1938, from Roth to "Matt Meehan, International Longshoremen's and Warehousemen's Union," which deals with a labor dispute.

But formal recognition of the factual situation has always been refused. In a letter to Henry Schmidt, president of the San Francisco local of the I. L. W. U., Roth denies that the I. L. W. U. had been recognized as the bargaining agency and states:

> . . . I am writing to reaffirm our position of neutrality in the present inter-union controversy between the I. L. A. and I. L. W. U. Neither the San Francisco Waterfront Employers Association nor the Pacific Coast Waterfront Employers Association has taken any position on the questions of which union is the proper collective bargaining agency, or which union is entitled to administer the existing contract. On the contrary, we have repeatedly informed both you and Mr. Bridges that

[24] The record contains two letters, dated August 18, 1937, and August 26, 1937, in which Bridges calls this to the employers' attention.

the Waterfront Employers would not take any position in favor of or against either of the parties to this controversy. My exact words were "we propose to walk straight down the middle of the road and let nature take its course".

In a letter from Roth to members of the Association, dated October 9, 1937, he states that the Association has taken no position on the question of which union shall act as agent of the men in negotiating future renewals or modifications of the contract.

While the practice of the parties during the period of the contract indicates an acceptance in fact of the I. L. W. U. District No. 1 as the labor organization party to the contract, it nevertheless is not necessary in this case to decide the precise legal status of the I. L. W. U. with respect to the contract. In considering the existence of a question concerning representation we need only consider that the last day for notice of a desire to modify or terminate the contract is July 31, 1938, that the employers refuse to recognize the I. L. W. U. and that it is essential that the proper collective bargaining agency be designated, so that negotiations for the next period may be facilitated and properly conducted.

We find that a question has arisen concerning the representation of longshoremen doing longshore work for the companies which are members of the various regional associations.

VIII. THE EFFECT OF THE QUESTION OF REPRESENTATION UPON COMMERCE

We find that the question concerning representation which has arisen, occurring in connection with operations of the companies described in Section I above, tends to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

IX. DETERMINATION OF REPRESENTATIVES

The longshoremen in each of the ports, with few exceptions,[23] signed cards designating the I. L. W. U. as their exclusive representative for purposes of collective bargaining,[24] which were presented in evidence. Lists of the longshoremen doing the work in each of the ports were also put into evidence. However, the lists for Port Orford, Oregon, and Newport, Oregon, were not presented, apparently through inadvertence, nor was any mention made of Port Blakely, Washington, although that port is referred to in the petition. These three ports are small ones as indicated by the number

[23] It was noted above that the longshoremen in the ports of Tacoma, Olympia, Port Angeles, and Anacortes did not join in the change of affiliation.

[24] The cards read: "I am employed exclusively as a longshoreman. I hereby designate and select the International Longshoremen's and Warehousemen's Union as my exclusive representative for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment."

of longshoremen who voted in the June 1937 referendum, which was 7 in Port Blakely, 26 in Newport, and 14 in Point Orford. A statement[27] of the per capita tax paid by the longshore locals for the months of June and September 1937 indicates that, for Port Orford, Oregon, I. L. A. Local 38–115 paid a per capita tax in June on 24 members and that I. L. W. U. Local 1–5 paid a per capita tax in September for 24 members; that for Port Blakely, Washington, neither I. L. A. Local 38-2, nor I. L. W. U. Local 1–43 paid any per capita tax; and that for Newport, Oregon, I. L. A. Local 38–110 paid a per capita tax in June on 32 members and I. L. W. U. Local 1–53 paid a per capita tax in September on 34 members. Thus, it is evident that the results could not be affected by including the lists of longshoremen for these three ports.[28]

Counsel for the I. L. A. and the I. L. A. Locals argued that the designation of representatives made in these cards should not be considered because of the fact that the men were forced to sign the cards. However, they presented no evidence whatsoever to support their contentions, except in the case of the port at Bellingham. The record would support the opposite contention, for the I. L. W. U. showed that it took great care to have no check made upon nonsigners and to have the signing of the cards a strictly voluntary act on the part of the men.

San Diego.—The longshoremen who have, in the last 6 months, been doing the longshore work in San Diego are the registered longshoremen who are members of I. L. W. U. Local 1–29, and permit card holders. A document[29] purporting to list the registered longshoremen in the Port of San Diego, furnished to the port by Waterfront Employers Association of Southern California, was introduced into evidence. However, D. C. Mays, president of I. L. W. U. Local 1–29, testified that the list was not up-to-date and that it included the names of men who have not been working in the port for some time. He introduced into evidence a list[30] of members of the Local as of February 11, 1938, and a list[31] of permit card holders, also compiled from the records of the Local, and said that the men on these lists were those who have been doing the longshore work in the port during the last 6 months. In the absence of any objections to these lists and of any denial of their accuracy, we will accept them as representing the total of the longshore workers in the port. There are 83 registered men and 33 permit card holders.

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[27] Petitioner Exhibit No. 74.

[28] Besides the cards, the returns on the June referendum are also strongly indicative of the sentiment of the longshoremen. The vote among the individual locals on the question of affiliation with the C. I. O. is set out in Appendix "H".

[29] Board Exhibit No. 23. This exhibit contains 137 names.

[30] Petitioner Exhibit No. 47.

[31] Petitioner Exhibit No. 48.

Ninety-three cards designating the I. L. W. U. as the exclusive collective bargaining representative were introduced into evidence. These cards were witnessed by Mays and J. Wilbur, secretary of the Local. Each of the witnesses personally knew the men signing the cards. The names on the cards have been checked and have been found to correspond with the names on the lists.

There is no I. L. A. Local operating in San Diego. The men are hired through the hiring hall which is maintained jointly by Local 1-29 and by Waterfront Employers Association of Southern California. Relations with employers are carried in the same manner as they were when the Local was I. L. A. Local 38-9.

Santa Barbara, Ventura and vicinity.—Substantially all the longshore work in these harbors was formerly done by members of I. L. A. Locals 38-105 and 38-129. These men are now members of I. L. W. U. Local 1-46.

Thirty-two cards were introduced into evidence. These cards were witnessed by Edmund Masson, secretary-treasurer of Local 1-46, who testified that he knew all the signers personally. His own card was also introduced. Masson identified the signature of Joseph Pico, whose card was not witnessed. The names on the cards have been checked and have been found to correspond to the names on a list of longshoremen furnished by Waterfront Employers Association of San Francisco.[32] That list contains 75 names.

When a line is not drawn through the word "exclusively" in the sentence "I am employed exclusively as a longshoreman" the signer is a member of the Union; when a line is drawn through the word "exclusively" as it was in the case of 13 of the cards, the signer is not a registered longshoreman but has appeared on the pay roll of the ships coming into these ports and has worked on the boats. The latter group will be included in the unit.

San Pedro and Los Angeles harbor.—The work in the port is done by the registered longshoremen and the permit men. The latter group consists of men who are given work after the regular longshoremen have all been sent out. In the past these men made their living exclusively or substantially from longshore work, but at the present time work is slack and less than half of the men are receiving any work. Men on the permit list come and go; there is no indication that these men are now anything more than casuals. They will not be included in the unit.

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[32] The list contains 75 names. Only 36 cards, altogether, were introduced into evidence. Masson testified that he did not know of any longshoremen regularly employed in the last 6 months in Santa Barbara and Ventura harbors who did not sign cards. It appears likely, therefore, that the list, which was submitted, pursuant to agreement, after the hearing had ended, contains many names of extra men. However, for the purpose of determining the question of majority, this list will be taken as accurate.

The cards of registered longshoremen that have been introduced into evidence have been compared with the list of longshoremen furnished to the Board by counsel for Waterfront Employers Association of Southern California and 2,209 cards were found to be signed by men on that list. There are 2,655 registered longshoremen.

The signing of the cards was witnessed by Ernest Bowen, president of I. L. W. U. Local 1–13, and Elmer Mevert, a member of the Local. These men knew most of the longshoremen personally. In case of doubt the signers were asked for their union membership books, so that their signatures could be compared.

I. L. W. U. Local 1–13 has about 2,516 members. It received its charter on October 7, 1937. Prior to that time the men had been in I. L. A. Local 38–82 which had some 2,640 members. The officials of I. L. A. Local 38–82 had been restrained by Court action from joining with the I. L. W. U. They, together with about 14 men who desired to remain in the I. L. A., and about 100 more men, stayed in I. L. A. Local 38–82, which had been restrained by the Courts from affiliating itself with the C. I. O. The 100 men remained in the I. L. A. Local "to protect the interests of the other 2,500." The cards included the cards signed by the men who have remained in the I. L. A. Local.

Everett, Washington.—The work in the Port of Everett is performed by the 258 longshoremen whose names appear on the list furnished by counsel for Waterfront Employers of Seattle. There are some called "permit men" who do work occasionally but they are not earning enough to support themselves and depend largely on other sources for their livelihood. They will not be included in the unit. Two hundred twenty-five of the registered longshoremen signed the cards.

H. F. McKennan, the dispatcher at Everett, stated that I. L. W. U. Local 1–32 came into existence as such in September 1937. Since then, the Labor Relations Committee has continued to function in the same way. The longshoremen are represented on the Committee by I. L. W. U. men; the companies have two local representatives and Ringenberg, of the Waterfront Employers of Seattle, on the Committee. There has been no change in the way the hiring hall has been operated. Dailey, who is the representative of the Employers Association in the Port, places the orders for longshoremen for all of the four or five companies which require longshore work in the port.

Before the change in affiliation, the Local was I. L. A. Local 38–76. There are no I. L. A. men in Everett at the present time.

Aberdeen, Washington.[33]—Cards presented from the Port of Aberdeen were witnessed by Joseph Kit Koski and Les Lambert, who knew each of the signers personally. The work in the port is performed by the registered longshoremen of whom there are 386. One hundred seventy-five cards signed by registered longshoremen were presented in evidence. More cards have not been signed because of a rumor to the effect that signature would prevent the aliens, mostly Finns who were longshoremen in the port, from getting their citizenship papers, and because many of the longshoremen took the position that they had already voted to affiliate with the C. I. O., that they had their I. L. W. U. books, and that further signing of cards was unnecessary.

The men in the port are dispatched through the same hiring hall they have had since 1934. The dispatcher is an I. L. W. U. member. The Labor Relations Committee in the port consists of four representatives from the companies, including Ringenberg, of Waterfront Employers of Seattle, and four representatives of the Union. Since the coming into existence of I. L. W. U. Local 1-24, there has been no change in the way labor relations with the companies have been carried on.

The men were formerly organized in I. L. A. Local 38-77. There are now no I. L. A. men in the port.

Port Gamble and Paulsbo, Washington.[34]—The work in Port Gamble is done by the 55 registered longshoremen named in the list of registered longshoremen submitted by Gregory Harrison. Fifty cards signed by these longshoremen were submitted in evidence. These cards were witnessed by William F. Falkner and Ward King, both of whom knew all the signers personally.

Since the change of affiliation, there has been no difference in the way labor relations in the port are handled. The men who did the work in the port were formerly members of I. L. A. Local 38-88; they are now members of I. L. W. U. Local 1-51.

Port Townsend, Washington.—The work in the port is done by the registered longshoremen and eight men who had been working in Ludlow,[35] where operations have ceased. These eight men, who derive their livelihood from longshore work, are dispatched from the hiring hall in Port Townsend after the registered longshoremen have been sent out. Thirty-two cards signed by registered longshoremen and Ludlow men[36] were introduced into evidence. There are 28 registered longeshoremen.

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[33] The port is at Grays Harbor, which is centrally located between the towns of Hoquiam and Aberdeen.

[34] Port Gamble is 7 miles from the town of Paulsbo.

[35] Port Ludlow is 20 miles from Port Townsend by road or by water.

[36] The eight Ludlow men are Martin Parkko, Neil Stark, Oscar W. Henningson, George Woodley, Francis Patsy, Joseph Patsy, Alfred Eldridge, and William Woodley.

Four of the persons named on the list of registered longshoremen in Port Townsend have been transferred and are no longer active longshoremen. They are P. Popowinski, C. Biewater, R. Ely, and H. Olsen.

The change in name and affiliation from I. L. A. Local 38–96 to I. L. W. U. Local 1–55 did not result in any change in the manner in which labor relations with employers are conducted. There are no I. L. A. men doing longshore work at the present time at Port Ludlow or Port Gamble.

Raymond, Washington.—The longshore work at Raymond is performed by the 116 registered longshoremen operating on a list of registered longshoremen at Willapa Harbor,[37] and casual workers. It is impossible for a casual worker to make his living at longshore work; they do longshore work along with various other odd jobs they can pick up. They will not be included in the unit.

One hundred seven cards signed by registered longshoremen and witnessed by Jack Price, who was at one time the dispatcher, and Bissenger, the present dispatcher, both of whom knew each of the signers personally, were introduced into evidence.

All the longshoring work is performed by members of I. L. W. U. Local 1–1. The present membership of the Local is substantially the same as the membership of I. L. A. Local 38–92, prior to the change in name and affiliation; there is no I. L. A. Local now functioning in Port Raymond.

The coming into existence of Local 1–1 did not result in any change in the manner in which labor relations are maintained, other than a decision to have the Labor Relations Committee meet every 30 days instead of irregularly. The three workers' representatives on the Labor Relations Committee are members of the I. L. W. U. Local.

Seattle, Washington.—The longshore work in the Port is performed by registered longshoremen, permit men, registered dock men, and grain handlers. Permit men are men who have not yet been admitted to the Union, although they will eventually become Union members. There is a separate board in the hiring hall for them. They contribute to the maintenance of the hiring hall, make their living exclusively by longshore work, and up until the recent slack period, have spent most of their time working as longshoremen.

Grain handlers are not registered longshoremen. They are men who do their own work first and are then sent out to do longshore work if they are needed. There is no indication that their longshore work is in any way regular and they will be excluded from the unit.

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[37] Willapa Harbor is a consolidated Port for the towns of Raymond and South Bend. The Port of Willapa Harbor is centrally located between the two towns.

Frank Smith, vice president of I. L. W. U. Local 1–19, and at one time a dispatcher, witnessed cards of registered longshoremen and permit men. He testified that he knew each of the signers. Dewey Bennett,[38] secretary of I. L. W. U. Local 1–19, and Thomas R. Richardson, president, also witnessed cards and testified as to the authenticity of the signatures.

A list of the registered longshoremen, dock men and permit men in Seattle contains 1,511 names.[39] One thousand three hundred forty-three of these men signed cards.

I. L. W. U. Local 1–19 is functioning under the old I. L. A. Local 38–12 constitution which they have changed in minor respects. The hiring hall has four I. L. W. U. dispatchers and is jointly maintained. The Local has used the same minute book from August 16, 1934, to March 3, 1938. There is no I. L. A. Local in Seattle whose members do any of the longshore work at the port.

Vancouver, Washington.—The longshore work in the Port of Vancouver is done by longshoremen hired through the hiring hall. No longshore work is performed by members of any I. L. A. Local.

The list of registered longshoremen includes grain handlers and dock workers. H. Mason, dispatcher at the hiring hall, checked the names of individuals on the roster of Vancouver longshoremen who are not regular longshoremen. Most of the names checked are those of casual workers. Fred Brown and H. Hopson have transferred from the Local. Of the 95 regular longshoremen, known personally to Mason, 87 signed cards which he witnessed.

Reedsport, Oregon.[40]—All longshore work in the Port is now performed by members of I. L. W. U. Local 1-48 or by permit men who have put in applications to join the Union. When a boat comes into the dock, the captain or the mate of the ship tells the dispatcher, E. E. Doyle, a member of the Union, how many men he wants and the dispatcher telephones the men.

There is no list of registered men for the Port. Waterfront Employers Association of San Francisco supplied a list containing 28 names of longshoremen and permit men who are to be included in the unit. Twenty-three of these men signed cards witnessed by Tom Richman, secretary of the Local. He knows each of the men personally.

Rainier, Oregon.—No longshore work is performed in Rainier except by men hired from the hiring hall, which is jointly maintained by the employers and by the I. L. W. U. There is no I. L. A. Local

[38] Bennett referred to "service men." From his description of that group, it is evident that he was referring to "permit men."

[39] Twelve men are deceased. They have not been counted.

[40] Reedsport is on Winchester Bay, about 28 miles from Coos Bay. Occasionally when help is needed, Coos Bay Local sends to Reedsport for extra men.

in Rainier whose members perform longshore work in the Port. Ray Williams, president of I. L. W. U. Local 1-45, which was, before the change in affiliation, I. L. A. Local 38-81, testified with respect to a list of longshoremen in the Port, that C. Girt, Byron Hirtzell, H. Jessee, and J. Rauch are casuals, A. Bustrim has quit longshoring work and John Bitte, while still a member of the Local, has not been working for a long period. Excluding these persons, 29 longshoremen are named on the list. Twenty-seven cards witnessed by Ray Williams were introduced. Williams knew the signers to be the persons whose names appear on the cards. His own card was witnessed by Marvin Girt, secretary of the Local.

Astoria, Oregon.—The work in the Port is performed by registered longshoremen and dock workers. The dock workers do the trucking on the dock when a ship comes in for salmon or flour. Although the dock workers are regular members of the Union, they do not work under the longshore arrangement and will therefore be excluded from the unit. The list of registered longshoremen and dock workers has been checked by A. Williams, a member of I. L. W. U. Local 1-50, which was, prior to the change in affiliation, I. L. A. Local 38-85. He has put a small "d" in front of the name of each dock worker, and a check mark in front of casual workers who do not make their living at longshore work and who are not to be included in the unit. There are 178 registered longshoremen. Ninety of these men signed cards.

North Bend, Oregon.—One hundred thirty-three cards signed by longshoremen who earn their living exclusively in longshore work in North Bend were witnessed by E. V. Schults, the recording secretary of I. L. W. U. Local 1-12. He was sure of the identity of each of the signers. The work in the Port is performed by I. L. W. U. members and permit men who are not members of the Union but who earn their living primarily or exclusively from longshore work in North Bend

Schults has gone through the list of Coos Bay longshoremen[41] and has put a check mark in front of the name of each person on the list who is not now a regular Coos Bay longshoreman. There are 140 names without checks.[42]

St. Helens, Oregon.—C. Kremer, secretary of I. L. W. U. Local 1-68 at St. Helens, and C. Stewart, a member, put check marks in front of the names of casual workers who do not customarily make a living at longshore work, which appear on a list of St. Helens longshoremen prepared by Waterfront Employers of Portland. J. F.

[41] North Bend is on Coos Bay Harbor.

[42] Witness believed that there were other men working as longshoremen who are not on the list which was furnished by counsel for the companies, but the Union did not object to the use of the list.

Brown, whose name appears on the list, has died. C. Schmidt is an injured longshoreman who occasionally works a day or sometimes two or three days. He belongs to the Local. He will be included in the unit; casual workers will not be included.

Forty-one cards witnessed by Kremer and Stewart were introduced. Both witnesses knew the persons signing the cards to be the persons whose names appear on the cards. There are 73 persons on the list whose names were not checked.

Longview, Washington.—Dewey Van Brunt, the dispatcher at the hiring hall in Longview, checked through the roster of Longview longshoremen and put a check mark in front of the name of each person who is not a regular longshoreman. One hundred seventy-five of the 235 regular longshoremen signed cards. Van Brunt, who witnessed the signing of the cards, testified that he was personally acquainted with each of the signers.

Bandon and Port Orford, Oregon.[45]—The torrential rains in the vicinity of Portland made it impossible for the men who could have testified with respect to the cards signed by the longshoremen in these two ports to get to the hearing. An exhibit in the form of a letter from the Waterfront Employers of San Francisco lists 21 longshoremen and 5 permit men who work at Bandon.

Newport, Oregon.[46]—D. Harding, who witnessed the signing of the cards by Newport longshoremen, is an invalid and was unable to leave his home to attend the hearing. The Trial Examiner ruled that an affidavit by Harding concerning these cards was inadmissible.

Portland, Oregon.—The persons doing longshore work in Portland are classified as longshoremen, dock workers, grain handlers, miscellaneous workers, permit men, and Garibaldi men.

The miscellaneous group includes those who tie and untie ships and a few sweepers. They are not classified as regular longshoremen, and, since the record contains no further information concerning them, they must be excluded from the unit.

The Garibaldi men are those who used to work in the Port of Garibaldi which has been closed down because of sand drifting into the Port. The District prorated the longshoremen in the Port and 13 of them work in Portland. They will be included in the unit.

The grain handlers operate under a separate contract. However, they plug in on the same board as do the regular longshoremen. They do both grain work and regular longshoring work; they are required to take the grain job first, if there is any available. The usual bill of lading provides for the delivery of grain by the terminal or the

[45] Port Orford has a population of 300 and is located approximately 30 miles south of Bandon.

[46] Newport is a port on Yaquina Bay, about half way between the Columbia River and Coos Bay. It is a town with approximately 1,530 people.

shipper to the ship's side, rather than to the first place of rest on a ship's dock, as usually in the case of other cargo. The grain handler thus is a longshoreman with respect to the grain, carrying the grain to the ship if the grain is sacked, or operating the grain elevator or belt to the ship's side. When there is no grain work these men do regular longshoring work. The roster of longshoremen submitted by Waterfront Employers of Portland puts longshoremen, dock workers, and grain handlers together in one list. The grain handlers will be included in the unit.

Dock workers have a separate board in the hiring hall on which to plug in. Formerly their function was to transfer the cargoes from the railroad cars or trucks to the dock floor. For this they were paid 85 cents an hour. During the last 2 years, however, the method of operation has changed and lift machines and lift boards are used. The lift machines have a hoist running in front of carriers. The lift board is brought to the cargo and the cargo is placed on it. The machine then carries it to the ship's sling, the sling is put under the cargo, and the cargo is lifted to the boat. Work with this new method is classified as longshore work and the dock workers receive regular longshoremen's pay for doing it. Ninety per cent of the work done by dock workers is now classified as longshore work. Besides, dock workers also do the same type of work that longshoremen not classified as dock workers do; they are sent out on this work after the men on the "big board," which is the regular longshoremen's and grain handlers' board, have been sent out. Dock workers will be included in the unit. Permit men will also be included.

The lists supplied by Waterfront Employers of Portland name 1,099 longshoremen, including grain handlers and dock workers and 126 permit men. Seven hundred seventy-four cards were presented in evidence. The witnesses to the signing of the cards testified that they either knew the men personally, checked the signatures on the cards with the signatures on the Union book, or in the case of permit men, called in mutual friends when they were not sure of the identity of the signer.

Bellingham, Washington.—The longshore work at Bellingham is performed by the 159 men named on a list furnished by Gregory Harrison. One hundred thirty-seven of these men signed cards witnessed by John Mallahan, secretary-treasurer of I. L. W. U. Local 1–7, who knew each of the signers personally.

After the change in affiliation of the Bellingham Local, they continued to use the same quarters, the same minute book and the same equipment in the hall.

Action had been taken by the Local in January or February 1938 to the effect that anyone who did not sign a card would not be permitted to work for one week. Phil Taylor and Herman Dale tried to start an I. L. A. Local and applied to the I. L. A. for a charter. Local 1-7 fined both these men $150 because of their activities. Dale has been injured since July 27, 1937, and has been unable to work. Taylor was not given any work after the fine had been imposed because he refused to pay the fine. L. B. Sulgrove, counsel for the I. L. A., stated that his purpose in introducing the testimony of Dale and Taylor was to show the method used to obtain the pledge cards and stated that more testimony was not introduced because men who testified would not be given any work.

It is only necessary to note that the action taken against Dale and Taylor was not because of failure to sign the cards, but because of their attempt to start an I. L. A. Local, that any action with respect to failure to sign was action taken by a majority of the Local, and that the secret ballot in the June 1937 referendum on the question of C. I. O. affiliation resulted in a vote of 124 to 12 in favor of such affiliation.

Tacoma, Washington.—The list [45] of registered longshoremen and registered dock workers at Tacoma contains 662 names.

Olympia, Washington.—The list [45] of registered longshoremen and permit men in Olympia contains 170 names.

Anacortes, Washington.—The list [45] of registered longshoremen in Anacortes contains 44 names.

Port Angeles, Washington.—The list [45] of the registered longshoremen in Port Angeles contains 114 names.

Eagle Harbor and Freeland, Washington.—The list of the longshoremen in Eagle Harbor and Freeland was furnished by the companies and contained 72 names.

Crescent City, California.—All the longshore work in this Port is performed by the 13 men who signed the cards. All but William Gettings earn their livelihood exclusively as longshoremen. Gettings works as an extra. He will not be included in the unit.

The list of registered longshoremen and permit men at Crescent City contains 15 names.

Monterey, California.—A. Martin Gallego, a longshoreman in Monterey, stated that there are only 17 longshoremen in the port and that other men who know how to do longshore work are called in when needed. The list submitted by Waterfront Employers Association of San Francisco, however, contains 77 names. On this state of the record, the list of the Association will be taken as accurate.

[45] Each of these lists has been submitted by the companies.

Gallego witnessed the signatures of eight men whom he knew personally. Gallego also identified the signature of Felix Urquida whose card was witnessed by M. B. Brown. Gallego could not identify the signatures of seven other men and this group of seven cards will not be considered.

Eureka, California.—Because the roads between Eureka and San Francisco had been washed out it was impossible for anyone who could authenticate the cards signed in the Port of Eureka to get to the hearing. A list of the longshoremen and "extras" in the Port of Eureka was presented in evidence. The "extras" are, in fact, permit men who are called upon after the regular longshoremen have been sent out. They will be included in the unit. The list contains 52 names.

San Francisco, California.—The hiring hall in San Francisco covers the San Francisco Bay region. Men work either on the "preferred" gangs which work for one company nearly all the time, or on "casual" gangs which may be dispatched to any employer at any time. There are 85 preferred gangs and 85 casual gangs in the port. The word "casual," in San Francisco, does not mean that a longshoreman is only occasionally employed but is used to distinguish the men on the casual gangs from those on the preferred gangs. There are also longshoremen in San Francisco who work from the "plug board," and who are used to fill vancancies in either preferred or casual gangs. The plug board is a board with a series of holes numbered in order. Longshoremen who work from the plug board are provided with a plug which is about 2 inches long and is of the thickness of a lead pencil and which bears a number corresponding with the number on the brass check which each longshoreman carries. The longshoreman puts his plug in the lowest numbered available hole and is sent out after all the men whose plugs preceded his have been sent out.

There are two types of permit men; those who are registered longshoremen and are not yet members of the Union, and those who are neither members of the Union nor registered longshoremen but who are working on permits issued by the joint Labor Relations Committee.

The longshoremen in all of the aforementioned groups are to be included in the unit. There are 4,039 names on the list of registered longshoremen at San Francisco and 345 permit men. Three thousand four hundred ninety-four cards of registered longshoremen and 289 cards of permit men, signed by men named on the list, and properly authenticated, were introduced into evidence.

Except in the case of a few cards, the cards are stamped "registered," indicating registered longshoremen; "member," indicating a

member of the Union; and "approved," indicating that the card is that of a permit man who is neither registered nor a member of the Union but who is entitled to work out of the hiring hall.

Summary

Port	Cards	Total number of employees	Port	Cards	Total number of employees
San Diego	93	116	Bandon	3	26
Santa Barbara, Ventura and vicinity	32	75	Port Orford		
San Pedro and Los Angeles Harbor	2,209	2,655	Newport		
Everett	225	258	Portland	774	1,099
Aberdeen	175	386	Bellingham	137	159
Port Gamble and Paulsbo	50	55	Tacoma		662
Port Townsend	[a] 32	[a] 36	Olympia		170
Raymond	107	116	Anacortes		44
Seattle	1,343	1,511	Port Angeles		114
Vancouver	87	95	Eagle Harbor		39
Reedsport	23	28	Freeland		33
Rainier	27	29	Crescent City	12	15
Astoria	90	178	Monterey	9	77
North Bend	133	140	Eureka		52
St. Helens	41	73	San Francisco	3,783	4,384
Longview	175	235	Total	9,557	12,860

[a] This figure includes the eight Ludlow men.

The summary indicates that of the 12,860 longshoremen in the appropriate unit, 9,557 have signed cards designating International Longshoremen's and Warehousemen's Union, District No. 1, as their representative for purposes of collective bargaining.

We find that International Longshoremen's and Warehousemen's Union, District No. 1, has been designated and selected by the majority of the longshoremen in the appropriate unit as their representative for the purposes of collective bargaining. It is, therefore, the exclusive representative of all the longshoremen in such unit for the purposes of collective bargaining, and we will so certify.

Upon the basis of the above findings of fact and upon the entire record of the case, the Board makes the following:

Conclusions of Law

1. A question affecting commerce has arisen concerning the representation of longshoremen in the Pacific Coast ports of the United States, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the National Labor Relations Act.

2. The workers who do the longshore work in the Pacific Coast ports of the United States for the companies which are members of Waterfront Employers of Seattle, Waterfront Employers of Portland, Waterfront Employers Association of San Francisco, Waterfront Employers Association of Southern California, and Shipowners Association of the Pacific Coast, constitute a unit appropriate for the

purposes of collective bargaining within the meaning of Section 9 (b) of the National Labor Relations Act.

3. International Longshoremen's and Warehousemen's Union, District No. 1, is the exclusive representative of all the workers in such unit for the purposes of collective bargaining, within the meaning of Section 9 (a) of the National Labor Relations Act.

CERTIFICATION OF REPRESENTATIVES

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Section 8 of National Labor Relations Board Rules and Regulations—Series 1, as amended

IT IS HEREBY CERTIFIED that International Longshoremen's and Warehousemen's Union, District No. 1, has been designated and selected by a majority of the workers who do longshore work in the Pacific Coast ports of the United States for the companies which are members of Waterfront Employers of Seattle, Waterfront Employers of Portland, Waterfront Employers Association of San Francisco, Waterfront Employers Association of Southern California, and Shipowners Association of the Pacific Coast, as their representative for the purposes of collective bargaining, and that pursuant to the provisions of Section 9 (a) of the Act, International Longshoremen's and Warehousemen's Union, District No. 1, is the exclusive representative of all such workers for the purposes of collective bargaining, in respect to rates of pay, wages, hours of employment and other conditions of employment.

APPENDIX A

1. International Longshoremen's and Warehousemen's Union, District No. 1.
2. Shipowners Association of the Pacific Coast.
3. Waterfront Employers Association of the Pacific Coast.
4. Waterfront Employers of Seattle.
5. Waterfront Employers of Portland.
6. Waterfront Employers Association of San Francisco.
7. Waterfront Employers Association of Southern California.
8. International Longshoremen's Association, District No. 38.
9. International Longshoremen's & Warehousemen's Union, Local 1-13.
10. Mr. A. H. Petersen.
11. International Longshoremen's Association, Local 38-82, Inc.
12. Ainsworth & Dunn Dock C
13. Alaska Steamship Compan

14. Albina Dock Company.
15. American Foreign S. S. Corp.
16. American-Hawaiian S. S. Co.
17. American Mail Line.
18. Ames Terminal Company.
19. Anderson & Middleton Lumber Co.
20. Anglo-Canadian Shipping Co.
21. Arlington Dock Company.
22. Arrow Stevedore Co.
23. Associated Banning Co.
24. Associated Banning Company (Berth 146).
25. Balfour, Guthrie & Co.
26. Barber Line.
27. Baxter & Company.
28. Beadle Steamship Co., Ltd.
29. Blue Funnel Line.
30. Blue Star Line.
31. Border Line Transportation Co.
32. Brady-Hamilton Steve. Co.
33. Bulk Carriers Corp.
34. Burns Steamship Company.
35. California Steve. & Ballast Co.
36. Canadian Transport Co.
37. Cargill, Incorporated.
38. Chamberlin S. S. Co. Ltd.
39. W. R. Chamberlin & Co.
40. Coastal Steamship Co.
41. Coastwise Line.
42. Columbia River Steve. Co.
43. Consolidated Olympic Line.
44. Coos Bay Lumber Company.
45. Crescent Wharf & Warehouse Co.
46. Deming, Roberg & Williams.
47. Dispatch Steve. & Cont. Co.
48. Dodwell Dock & Whse. Co., Inc.
49. Dollar Steamship Lines.
50. Dollar Steamship Lines Inc., Ltd.
51. Donaldson Line.
52. Donaldson Line (Balfour, Guthrie & Co.)
53. Katherine Donovan S. S. Co.
54. Donovan Lumber Co.
55. East Asiatic Company.
56. East Waterway Dock & Whse. Co.
57. El Dorado Oil Works.
58. Elliott Bay Service Co.
59. Empire Lumber Co.
60. Everett Stevedoring Co.
61. S. S. Freeman Co.
62. French Line.
63. Fruit Express Line.
64. Furness (Pacific) Line.
65. General S. S. Corp.
66. General Steve. & Ballast Co.
67. Girdwood Shipping Company.
68. Gorman Lumber Co.
68-A. Gorman Steamship Co.
69. Grace Lines, Inc.
70. W. R. Grace & Company.
71. Gray & Owners S. S. Daisy.
72. Grays Harbor Stevedore Co.
73. Great Northern Railway.
74. Griffiths & Sprague Steve.
75. James Griffiths & Sons, Inc.
76. Hamburg-American Line.
77. Hammond Lumber Company.
78. Hammond Shipping Co., Ltd.
79. J. R. Hanify Company.
80. Hart-Wood Lumber Co.
81. Chas. H. Higgins Co.
82. Hobbs-Wall & Company.
83. Holland-America Line.
84. Holmes Eureka Lumber Company.

85. Independent Stevedore Co.
86. International Steve. Co.
87. Interocean Line.
88. Interocean Steamship Corp., Ltd.
89. Interstate Terminals.
90. Italian Line.
91. Johnson Line.
92. A. B. Johnson Lumber Co.
93. W. J. Jones & Son.
94. The Jordan Company.
95. "K" Line.
96. Kerr S. S. Company, Ltd.
97. Kingsley Company of California.
98. The Kingsley Co. of California.
99. Kingsley Navigation Co.
100. Kinney Shipping Company.
101. Kitsap Lumber Co.
102. Kitsap S. S. Company (San Pedro, Cal.).
102-A. Kitsap S. S. Company (Tacoma, Wash.).
103. Klaveness Line.
104. Knutsen Line.
105. Kolusai Kisen Kaisha.
106. J. Lauritzen Line.
107. Lawrence-Phillips Lumber Company.
108. Lawrence-Phillips S. S. Co.
109. Leslie Salt Company,
110. Mr. Fred Linderman.
111. L. A.-S. F. Navigation Co.
112. Luckenbach Gulf S. S. Co.
113. Luckenbach S. S. Company.
114. Luckenbach Gulf Steamship Co.
115. H. E. Mansfield, Inc.
116. Marine Terminals Corp. (San Francisco).
117. Marine Terminals Corp. (Terminal Island, Cal.).
118. J. E. Marshall, Inc.
119. Matson Navigation Co.
120. Matson Terminals, Inc.
121. Matthews & Owners, S. S. Daisy.
122. McCormick S. S. Co.
123. Metropolitan Stevedore Co.
124. Mitchell Stevedoring Co.
125. Mitsubishi Shojen Kaisha.
126. Mitsui & Co.
127. J. J. Moore & Co., Inc.
128. Moore S. S. Co.
129. N. Y. K. Line.
130. National S. S. Co.
131. Nippon Yusen Kaisha.
132. North German Lloyd.
133. North Pacific Coast Line.
134. Northern Stevedores, Inc.
135. Northland Transportation Co.
136. Norton, Lilly & Co.
137. Oceanic Terminals.
138. John C. Ogden.
139. Fred Olsen Line.
140. The Olsen Line, Inc.
141. Fred Olson Line.
142. Oliver J. Olson & Co.
143. Olympia Stevedoring Company.
144. Olympic Steamship Co., Inc.
145. Olympic Stevedoring Co.
146. Oregon Stevedoring Co.
147. Outer Harbor Dock & Wharf Co.
148. Owens-Parks Lumber C .
149. P. L. Transportation Co.
150. Pacific Argentine Brazil Line.
151. Pacific-Atlantic S. S. Co.
152. Pacific Java Bengal Line.
153. Pacific Lighterage Corp.
154. Pacific Steve. & Ballasting Co.

155. Panama Mail S. S. Company.
156. Paramino Lumber Co.
157. Portland Stevedoring Co.
158. Powell Shipping Company.
159. Prince Line.
160. Prince Line, Ltd.
161. Puget Sound Stevedoring Co.
162. Quaker Line.
163. Capt. J. Ramselius.
164. Redwood Steamship Co.
165. E. L. Reitz Lumber Company.
166. Reitz S. S. Co.
167. Rothschild - International Steve. Co.
168. Royal Mail Lines.
169. Royal Mail Lines, Ltd.
170. Salmon Terminals, Inc.
171. San Francisco Steve. Co.
172. Santa Ana S. S. Co.
173. Schafer Bros. Steamship Company.
174. Schafer Bros. S. S. Lines.
175. Schafer Bros. Steamship Lines.
176. Schirmer Stevedoring Co.
177. Seaboard Steve. Company.
178. Seaboard Steve. Corp.
179. Seaboard Stevedoring Corp.
180. Seaboard Steve. Corp. of Wash.
181. Shepard S. S. Company.
182. Sivertsen J. Martin Steve. Co.
183. States S. S. Co.
184. Soto Shipping Company, P. F.
185. Southland Steamship Co.
186. Southwestern Stevedoring Co.
187. Sudden & Christenson.
188. Supple Docks, Inc.
189. Swayne & Hoyt, Ltd.
190. Transatlantic S. S. Co.
191. Transpacific Transportation Co.
192. Twin Harbor Stevedoring Co.
193. Union Sulphur Co.
194. United Fruit Co.
195. United Ocean Transport Co., Ltd.
196. Viking Steamship Co.
197. Virginia Dock & Trading Co.
198. Washington Stevedoring Co.
199. Frank Waterhouse & Co. of Can. Ltd.
200. Western Stevedore Co.
201. Westfal-Larson Co. Line.
202. Weyerhaeuser S. S. Line.
203. Wheeler-Hallock Co.
204. Willapa Harbor Stevedoring Co.
205. E. K. Wood Lumber Co.
206. Wamashita Shipping Co. (Portland, Ore.)
207. Wamashita Shipping Co. (Seattle, Wash.)
208. International Longshoremen's Association, Local 38-142.
209. International Longshoremen's Association, Local 38-114.
210. International Longshoremen's Association, Local 38-97.
211. International Longshoremen's Association, Local 38-83.
212. International Longshoremen's Association, Local 38-86.

213. International Longshoremen's Association, Local 38–89.
214. International Longshoremen's Association, Local 38–78.
215. International Longshoremen's Association, Local 38–82.
216. International Longshoremen's Association, Local 38–79.
217. International Longshoremen's Association, District No. 38.
218. P. W. Walker.
219. R. A. Patterson.
220. C. H. Lindegren.
221. C. H. Lindegren.
222. M. D. Rogers.
223. Elmer Bruce.
224. O. M. Benton.
225. A. L. Bebo.
226. W. J. Hale.
227. Jack Edwardson.
228. J. O. Bowlbey.
229. Joe Sumpton.

APPENDIX B

Shipowners' Association

Anderson & Middleton Lumber Co.
Baxter & Co., J. H.
Beadle Steamship Co., Ltd.
Burns Steamship Co.
Chamberlin & Co., W. R.
Coastal Steamship Co.
Coastwise Steamship & Barge Co.
Consolidated Olympic Line.
Coos Bay Lumber Co.
Dispatch Stev. & Cont. Co.
(Empire Lumber Co., charterers.)
Donovan Lumber Co.
Freeman & Co., S. S.
Gorman Lumber Co.
Griffiths & Sons, James, Inc.
(Griffiths Steamship Co.)
Hammond Shipping Co., Ltd.
Hanify Co., J. R.
Hart-Wood Lumber Co.
Higgins, Chas. H.
Hobbs, Wall & Co.
Johnson Lumber Co., A. B.
Kingsley Company of California.
Kitsap Lumber Co.
Lawrence-Philips Steamship Co.
Linderman, Fred.
L. A.-S. F. Navigation Co.
McCormick Steamship Co.
Moore Steamship Co.
National Steamship Co.
Olson Line, Inc.
(Olson & Co., Oliver J.)
Owens-Parks Lumber Co.
P. L. Transportation Co.
Paramino Lumber Co.
Ramselius, Capt. J.
Redwood Steamship Co.
Reitz Steamship Co.
Schafer Bros. Steamship Lines.
Sudden & Christenson.
Southland Steamship Co.
Wheeler-Hallock Co.
Wood Lumber Co., E. K.

APPENDIX C

Waterfront Employers Association of the Pacific Coast

SHIPPING MEMBERS

Alaska Steamship Company.
American Foreign S. S. Corp.
American Hawaiian S. S. Co.
American Mail Line.
Anglo-Canadian Shipping Co.
Barber Line.
Baxter & Company.
Blue Funnel Line.
Blue Star Line.
Bulk Carriers Corp.
Burns Steamship Company.
Canadian Transport Co.
Chamberlin S. S. Co. Ltd.
Coastal Steamship Co.
Coastwise Line.
Consolidated Olympic Line.
Coos Bay Lumber Company.
Donaldson Line.
Katherine Donovan S. S. Co.
East Asiatic Company.
Empire Lumber Co.
S. S. Freeman Co.
French Line.
Fruit Express Line.
Furness (Pacific) Line.
General S. S. Corp.
Girdwood Shipping Company.
Gorman Steamship Co.
Grace Lines, Inc.
James Griffiths & Sons, Inc.
Hamburg-American Line.
Hammond Shipping Co., Ltd.
J. R. Hanify Company.
Hart-Wood Lumber Co.
Chas. H. Higgins Co.
Hobbs-Wall & Company.
Holland-America Line.
Interocean Line.
Italian Line.
Johnson Line.
A. B. Johnson Lumber Co.
"K" Line.
Kerr S. S. Company, Ltd.
Kingsley Navigation Co.
Kitsap S. S. Company (Tacoma, Wash.)
Kitsap S. S. Company (San Pedro, Cal.)
Klaveness Line.
Knutsen Line.
Kokusai Kisen Kaisha.
Lauritzen Line, J.
Lawrence-Phillips S. S. Co.
Mr. Fred Linderman.
Luckenbach S. S. Company.
Matson Navigation Co.
McCormick S. S. Co.
Mitsui & Co.
Moore S. S. Co.
National S. S. Co.
North German Lloyd.
Northland Transportation Co.
Norton, Lilly & Co.
N. Y. K. Line.
John C. Ogden.
Fred Olsen Line.
Oliver J. Olson & Co.
Olsen Line, Inc.
Owens-Parks Lumber Co.
Pacific-Atlantic S. S. Co. (Quaker Line).
Panama Mail S. S. Company.
Paramino Lumber Co.
P. L. Transportation Co.
Prince Line, Ltd.
Capt. J. Ramselius.
Reitz S. S. Co.
Royal Mail Lines, Ltd.

Santa Ana S. S. Co.
Schafer Bros. S. S. Lines.
Schafer Bros. Steamship Lines.
Shepard S. S. Company.
States S. S. Co.
Sudden & Christenson.
Swayne & Hoyt, Ltd.
Transatlantic S. S. Co.
Transpacific Transportation Co.
Union Sulphur Co.
United Fruit Co.
United Ocean Transport Co., Ltd.
Viking Steamship Co.
Frank Waterhouse & Co. of Canada, Ltd.
Westfal-Larson Co. Line.
Weyerhaeuser S. S. Line.
Wheeler-Hallock Co.
Wood Lumber Co., E. K.
Yamashita Shipping Co.

ASSOCIATE MEMBERS

Ainsworth & Dunn Dock Company.
Albina Dock Company.
Ames Terminal Company.
Arlington Dock Company.
Associated Banning Company.
B. & H. Stevedoring Corp.
Bellingham Contracting & Stevedoring Co.
Brady Hamilton Stevedore.
Cargill Incorporated.
Columbia Basin Terminals.
Columbia River Stevedoring Company.
Deming, Roberg & Williams, Inc.
Dispatch Stevedore & Contracting Company.
Dodwell Dock & Warehouse Co.
East Waterway Dock & Warehouse Co.
El Dorado Terminal Co.
Elliott Bay Service Company.
Everett Stevedoring Company.
General Stevedore & Ballast Co.
Grays Harbor Stevedore Company.
Griffiths & Sprague Stevedoring Co.
Independent Stevedore Company.
International Stevedoring Company.
Interstate Terminals.
W. J. Jones & Son Inc.
The Jordan Company.
Leslie Salt Company.
Longview Stevedoring Company.
H. E. Mansfield Inc.
Marine Terminals Corp.
Mitchell Stevedoring Co.
Mitchell Stevedoring Company.
Northern Stevedores Inc.
Oceanic Terminals.
Olympia Stevedoring Co.
Olympic Stevedore Co.
Oregon Stevedoring Company.
Pacific Stevedoring & Ballasting Co.
Portland Stevedoring Co.
Powell Shipping Co.
Puget Sound Stevedoring Co.
Rothschild International Steve. Co.
Salmon Terminals.
The San Francisco Stevedoring Co.
Stevedore Service Co.
Supple Docks Inc.
Thomas & Kear.
Twin Harbor Stevedoring Co.
Washington Stevedoring Co.
Western Stevedore Co.
Willapa Harbor Stevedoring Co.

APPENDIX D

Waterfront Employers of Seattle Membership List

DEC. 7, 1937

Ainsworth & Dunn Dock Co.
Alaska Steamship Company.
Ames Terminal Company.
American Foreign S. S. Corp.
(Matthewson Shipping Co., Agents).
American-Hawaiian Steamship Co.
American Mail Line.
Anglo-Canadian Shipping Co.
(Girdwood Shipping Co., Agents).
Arlington Dock Company.
Arrow Line.
(Sudden & Christenson.)
Blue Funnell Line.
(Dodwell & Co., Ltd., Agents.)
Blue Star Line, Inc.
Border Line Transportation Co.
Canadian Transport Company.
(Paul A. Umoff, Agent.)
Cargill, Incorporated.
Coastal Steamship Company.
Coastwise Line.
Deming, Roberg & Williams.
Dodwell Dock & Whse. Co., Inc.
Donaldson Line.
(Balfour, Guthrie & Co.)
East Asiatic Company, Inc.
East Waterway Dock & Whse. Co.
Elliott Bay Service Co.
Everett Stevedoring Co.
Fred Olson Line.
(Girdwood Shipping Co., Agents.)
French Line.
(General S. S. Co.)
Fruit Express Line.
(International Pacific Coast Corp.)
Furness (Pacific) Ltd.
(Burchard & Fisken, Agents.)
Girdwood Shipping Co.
Grace Line (W. R. Grace & Co.).
Grays Harbor Stevedore Co.
Great Northern Ry.
Griffiths & Sprague Stevedoring.
Griffiths, James & Son.
Hamburg-American Line.
(Sudden & Christenson.)
Hammond Shipping Co.
Johnson Line of Stockholm.
(W. R. Grace & Co.)
Jordan, The Company.
Kingsley Co. of California.
Kerr S. S. Co. (Silver Java Pacific).
(Burchard & Fisken, Agents.)
Klaveness Line.
(Sudden & Christenson.)
Knutsen Line.
(Interocean S. S. Corp.)
Lauritzen Line, J.
(Girdwood Shipping Co., Agents.)
Leslie Salt Co.
Libera Line.
(General S. S. Co., Agents.)
Luckenbach Gulf Steamship Co.
Luckenbach Steamship Co., Inc.
Matson Navigation Co.
(Alexander & Baldwin.)
Matson Terminals, Inc.
Mitchell Stevedoring Co.

Moore, J. J. & Co., Inc.
(W. L. Macquarrie, Agent.)
McCormick Steamship Co.
Mansfield, Inc., H. E.
Nippon Yusen Kaisha.
North German Lloyd.
Northern Stevedores, Inc.
Northland Transportation Co.
Norton, Lilly & Co.
(Agents for Isthmian S. S.)
Olympia Stevedoring Company.
Olympic Steamship Co., Inc.
(Consolidated-Olympic S. S. Co.)
Olympic Stevedoring Co.
Pacific Java Bengal Line.
(Burchard & Fisken, Agents.)
Puget Sound Stevedoring Co.
Quaker Line.
Rothschild-International Steve. Co.
Royal Mail Lines, Ltd.
Salmon Terminals, Inc.
Santa Ana Steamship Co.
Seaboard Stevedoring Corp. of Wash.
Shepard Steamship Company.
Swayne & Hoyt, Ltd.
Transatlantic S. S. Co., Ltd.
(General S. S. Co.)
Twin Harbor Stevedoring Co.
Virginia Dock & Trading Co.
Washington Stevedoring Co.
Waterhouse, Frank & Co. of Canada.
Western Stevedore Co.
Westfal-Larsen Line.
(General S. S. Co.)
Weyerhaeuser Steamship Co.
Willapa Harbor Stevedoring Co.
Yamashita Shipping Co.

APPENDIX E

Waterfront Employers of Portland Membership Roster as of February 3, 1938

American Hawaiian S. S. Co.
American Mail Line.
Anglo Canadian S. S. Co.
Balfour Guthrie & Co.
Bulk Carriers Corp.
Chamberlin S. S. Co.
Coastwise Line.
Fred. Olsen Line.
French Line.
Fruit Express Line.
Furness (Pacific) Ltd.
General Steamship Corp.
Grace Line.
Hammond Shipping Co., Ltd.
Italian Line.
Johnson Line.
Kerr Steamship Company.
Kinney Shipping Company.
J. Lauritzen Line.
Luckenbach Steamship Co.
Matson Navigation Company.
McCormick Steamship Co.
North German Lloyd.
North Pacific Coast Line.
Pacific Argentine Brazil Line.
Powell Shipping Company.
Schafer Bros. S. S. Co.
States Steamship Co.
Sudden & Christenson.
Swayne & Hoyt.
Transpacific Transp. Co.
Weyerhaeuser Steamship Co.
Wheeler-Hallock Co.
Yamashita Shipping Co.

STEVEDORES

Brady-Hamilton Steve.
International Steve. Co.
W. J. Jones & Son.
Oregon Stevedoring Co.
Portland Stevedoring Co.
Seaboard Stevedoring Corp.

STEVEDORES—OUTPORTS

Columbia River Steve. Co.
Independent Stevedore Co.

DOCK OPERATORS

Albina Dock Company.
Interstate Terminals.
Oceanic Terminals.
Supple Docks, Inc.
Total—46 members.

APPENDIX F

MEMBERS OF WATERFRONT EMPLOYERS ASSOCIATION OF SAN FRANCISCO

SHIPPING AND STEVEDORE MEMBERS

American-Hawaiian SS Co.
Arrow Stevedore Co.
Associated Banning Co.
Calif. Steve. & Ballast Co.
Coos Bay Lumber Co.
Dollar Steamship Lines.
Donaldson Line, Ltd.
French Line.
Furness (Pacific) Ltd.
General Steamship Corp.
General Steve. & Ballast Company.
Grace Line.
Hamburg American Line.
Holland America Line.
Johnson Line.
Kerr Steamship Company.
Luckenbach SS Company.
Luckenbach Gulf SS Co.
Marine Terminals Corp.
Matson Navigation Co.
McCormick Steamship Co.
North German Lloyd.
Pacific Lighterage Corp.
Mitchell Stevedoring Co.
Panama Mail Steamship Co.
San Francisco Steve. Co.
Schirmer Stevedoring Co.
Seaboard Steve. Corp.
Sivertsen J. Martin Steve. Company.
Swayne & Hoyt, Ltd.
Transpacific Transp. Co.
United Fruit Company.

ASSOCIATE MEMBERS

Chamberlin, W. R. & Co.
El Dorado Oil Works.
Hammond Shipping Co., Ltd.
The Kingsley Co. of Calif.
Pacific Stevedoring & Ballasting Co.

APPENDIX G

Membership List of Waterfront Employers Association of Southern California

DECEMBER 30, 1937

American Hawaiian Steamship Company.
Arrow Line. (See Sudden & Christenson.)
Associated Banning Company.
Bank Line. (See Marshall, Inc., J. E.)
Barber Line:
    Barber Steamship Lines, Inc.
    Barber Wilhelmson Line.
Baxter & Company, J. H.
Blue Funnell Line (c/o Dodwell & Company).
Blue Star Line. (See Marine Terminals Corp.)
Calmar Line. (See Swayne & Hoyt, Ltd.)
Chamberlin Steamship Company, W. R.
Coos Bay Lumber Company.
Crescent Wharf & Warehouse Company.
Dollar Steamship Lines Inc., Ltd.:
    Tacoma & Oriental Steamship Company.
    Mexican Mail Steamship Company.
French Line. (See General Steamship Corp., Ltd.)
Fruit Express Line (c/o Dodwell & Company).
Furness Line (c/o Furness (Pacific) Ltd.).
General Steamship Corporation, Ltd.:
    French Line.
    Libera Line (Italian Line).
    Shepard Line.
    Silver Line.
    Transatlantic Steamship Company of Gothenberg.
    United Ocean Transport Company.
    Westfal Larsen Company.
    Silver Java Pacific Line, Kerr Steamship Company } Pacific Java Bangal Line.
Grace & Company, W. R.:
    Panama Mail Steamship Company.
    Johnson Line.
Gray & Owners, S. S. Daisy, c/o Freeman & Co., SS.
Gulf Pacific Line. (See Swayne & Hoyt, Ltd.)
Gulf Pacific Mail Line. (See Swayne & Hoyt, Ltd.)
Hamburg-America Line. (See Sudden & Christenson.)

Hammond Lumber Company:
    Hammond Shipping Company.
Hanify, J. R.
Holland-America Line, c/o Furness (Pacific) Ltd.
Holmes Eureka Lumber Company (Redwood Steamship Company).
Interocean Steamship Corp., Ltd.:
    Interocean Line.
    "K" Line (Kawasaki Kisen Kaisha).
    Knutsen Line.
    Pacific Coast Direct Line.
    Weyerhaeuser Steamship Company.
Isbrandtsen-Moller (Maersk Line). (See Soto Shipping Co., P. F.)
Johnson Line. (See Grace & Company, W. R.)
"K" Line (Kawasaki Kisen Kaisha). (See Interocean Steamship Corp.)
Kerr Steamship Company. (See General Steamship Corp., Ltd.)
Kingsley Company of California, c/o McCormick Steamship Company.
Klaveness Line. (See Sudden & Christenson.)
Knutsen Line. (See Interocean Steamship Corp.)
Lawrence-Philips Lumber Company.
Libera Line (Italian Line). (See General Steamship Corp.)
Luckenbach Steamship Co., Inc.:
    Luckenbach Gulf Steamship Company.
McCormick Steamship Company:
    McCormick Lumber Company, Chas. R.
Marine Terminals Corp.:
    Blue Star Line.
Marshall, Inc., J. E.:
    Bank Line.
Matson Navigation Company:
    Matson Steamship Company.
    Matson Terminals Corp.
    Oceanic Steamship Company.
Matthews & Owners, Daisy, c/o Freeman & Company, S. S.
Metropolitan Stevedore Company.
Mexican Mail Steamship Company. (See Dollar Steamship Lines, Inc., Ltd.)
Mitsubishi Shojen Kaisha, c/o Wickersham & Co., W. H.
Nippon Yusen Kaisha.
Oceanic Steamship Company. (See Matson Navigation Company.)
Olsen Line, Fred. (See Soto Shipping Co., P. F.)
Olson & Co., Oliver J.

Outer Harbor Dock & Wharf Company.
P. L. Transportation Company (Pacific Lumber Company).
Pacific Coast Direct Line. (See Interocean Steamship Corp.)
Panama Mail Steamship Lines. (See Grace & Co., W. R.)
Prince Line, c/o Furness (Pacific) Ltd.
Ramselius & Company, J.
Reardon Smith Line. (See Sudden & Christenson.)
Reitz Lumber Company, E. L.
Royal Mail Lines, c/o Furness (Pacific) Ltd.
Schafer Bros. Steamship Company.
Seaboard Steve. Company.
Shepard Line. (See General Steamship Corp., Ltd.)
Silver Line. (See General Steamship Corp., Ltd.)
Silver Java Pacific Line. (See General Steamship Corp., Ltd.)
Southwestern Stevedoring Company.
Soto Shipping Company, P. F.:
    Isbrandtsen Moller Company (Maersk Line).
    Olsen Line, Fred.
Sudden & Christenson:
    Arrow Line.
    Hamburg American Line.
    Klaveness Line.
    Reardon Smith Line.
Swayne & Hoyt, Ltd.:
    Calmar Line.
    Gulf Pacific Line.
    Gulf Pacific Mail Line.
Tacoma & Oriental Steamship Company. (See Dollar Steamship Lines Inc. Ltd.)
Transatlantic Steamship Company of Gothenberg. (See General SS Corp. Ltd.)
United Fruit Company.
United Ocean Transport Company. (See General Steamship Corp., Ltd.)
Westfal Larsen Company. (See General Steamship Corp., Ltd.)
Weyerhaeuser Steamship Company. (See Interocean Steamship Corp., Ltd.)
Wood Lumber Company, E. K.

APPENDIX H

Results of Ballot—Pacific Coast District I. L. A.

Question: "Shall we affiliate with the C. I. O.?"

Local No.	City	Yes	No
38-2	Port Blakely	5	2
38-4	Bandon	13	3
38-9	San Diego	69	4
38-12	Seattle	836	296
38-36	Seattle	37	90
38-44	San Francisco	2,445	411
38-67	Vancouver		
38-76	Everett	91	39
38-77	Aberdeen		
38-78	Portland	734	169
38-78A	Portland	7	87
38-79	San Francisco	2,220	703
38-80	Longview	145	12
38-85A	Astoria	15	14
38-92	San Pedro	1,500	444
38-83	Anacortes	4	22
38-84	St. Helens		
38-86	Port Angeles	40	43
38-88	Poulsbo	43	2
38-89	Olympia		
38-90	San Francisco	91	227
38-91	San Pedro	63	9
38-92	Raymond	100	1
38-93	Stockton	104	2
38-94	North Bend	58	12
38-95	Winchester Bay	11	0
38-96	Port Townsend	26	0
38-97	Tacoma	126	320
38-98	Bellingham	124	15
38-100	San Francisco	100	0
38-101	San Francisco	176	22
38-102	Stockton	97	7
38-103	Eureka	46	11
38-105	Santa Barbara	18	2
38-106	Los Angeles	44	6
38-107	San Pedro	35	258
38-108	Stockton	16	7
38-110	Newport	2	24
38-111	Crescent City	9	1
38-113	Seattle		
38-114	Tacoma	9	29
38-115	Port Orford	14	0
38-116	Ketchikan	15	4
38-117	Seattle	257	43
38-118	Sacramento	142	8
38-119	Wilmington	50	16
38-120	San Diego	64	3
38-122	Tacoma	2	0
38-123	Portland	331	59
38-125	Ventura	15	0
38-126	Vancouver	58	33
38-130	Victoria		
38-131	Bellingham	80	5
38-132	San Francisco	22	8
38-135	Portland	81	7
38-137	Hilo, Hawaii	236	0
38-140	Monterey	16	0
38-142	Skagway	14	0
38-143	Tacoma	15	0
38-104	Juneau	23	2
38-144	Ketchikan	55	0
38-145	Eureka	12	5
38-146	Stockton	7	3
38-147	New Westminster	21	1
38-78	Portland	3	1
38-81	Rainier	7	11
38-85	Astoria	69	83
38-94A	North Bend		
38-109	Stockton	164	11
38-112	Cordova		
38-121	Harbor		
38-124	San Francisco		
38-127	New Westminster	28	0
38-129	Seward		
38-134	Los Angeles	282	23
38-136	Honolulu	257	2
38-138	Seattle		
38-141	Valdez		
38-148	Sitka	8	3
38-149	Portland		
38-150	Seattle		

[1] Garfibaldi Local men in 38-78.

We could have had probably half the industry if separate votes between

U. S. GOVERNMENT PRINTING OFFICE: 1938

[fol. 62] EXHIBIT "B" TO PETITION

UNITED STATES OF AMERICA:

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. R-638

In the Matter of SHIPOWNERS' ASSOCIATION OF THE PACIFIC COAST, WATERFRONT EMPLOYERS ASSOCIATION OF THE PACIFIC COAST, THE WATERFRONT EMPLOYERS OF SEATTLE, THE WATERFRONT EMPLOYERS OF PORTLAND, THE WATERFRONT EMPLOYERS ASSOCIATION OF SAN FRANCISCO, THE WATERFRONT EMPLOYERS ASSOCIATION OF SOUTHERN CALIFORNIA, and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, DISTRICT NO. 1

Case No. R-572

In the Matter of WATERFRONT EMPLOYERS ASSOCIATION OF SOUTHERN CALIFORNIA and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 1-13

OBJECTIONS, EXCEPTIONS AND MOTIONS OF THE AMERICAN FEDERATION OF LABOR, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, WEST COAST LOCALS

Now come the American Federation of Labor, and those International Longshoremen's Association, West Coast Locals, which are affiliated with the American Federation of Labor and specifically described in the opinion of the Board in cases R-638 and R-572, hereinafter called petitioners, by Joseph A. Padway, attorney, and upon all the records, files and proceedings in the above entitled matter, file the following exceptions, objections and motions.

Petitioners object and except to the order of certification of the National Labor Relations Board in the above entitled matter, such order of certification being dated the 21st day of June, 1938, certifying the International Longshoremen's and Warehousemen's Union, District 1, as the exclusive representative for the purpose of collective bargaining of all the workers who do longshore work in the Pacific Coast ports of the United States for the companies which are members of Waterfront Employers of Seattle, Waterfront Employers of Portland, Waterfront Employers Association of San Francisco, Waterfront Employers Association of [fol. 63] Southern California, and Ship Owners Association

of the Pacific Coast, for the reason that such certification is contrary to law, and contrary to the facts as set forth in the said Board's findings of fact in the above entitled matter, and for the reason that such certification is contrary to the spirit, purpose and intent of the National Labor Relations Act in that said National Labor Relations Act does not contemplate and does not lawfully permit an employee unit constituting all the employees of different employers in different and distant geographical districts of the United States.

Further, that petitioners have been denied rights accorded them under the National Labor Relations Act, particularly under Section 7 thereof, which states:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

That petitioners have been denied such rights for the reason that the Board's findings of fact herein state that certain distinct groups of employees are members of separate unions, in different geographical locations, and that the members in each of such unions constitute a majority of the employees employed in the longshore work in the respective cities where such unions are located; that such unions are affiliated with the American Federation of Labor and constitute the petitioners herein; that such majority of members in each such union has constituted each such union as its bargaining representative to negotiate with respective employers concerning wages, hours and working conditions; that the order of certification unlawfully denies to the petitioners the right of self-organization and representation as hereinbefore set forth.

That for the foregoing reasons the said order of certification of the said Board is void and of no effect; and furthermore, that said order of certification constitutes an unconstitutional denial of property and other valuable rights to the American Federation of Labor and its affiliated unions and the members thereof involved in the above entitled matter, petitioners herein.

Petitioners further state that by such unlawful order of certification their rights have been grievously and adversely affected and therefore petitioners appeal to said Board for

a rehearing and a reconsideration of the Board's decision in this case.

Wherefore petitioners pray and move for a rehearing and a reconsideration of said case on the basis of the objections hereinbefore urged, and for a reversal of said order of certification.

Petitioners further pray that immediate consideration be given this application for leave for rehearing so that their rights may be expeditiously determined, for the reason that present and future contractual rights are involved and dependent upon the decision of the Board.

Joseph A. Padway, Counsel, American Federation of Labor, International Longshoremen's Association, West Coast Locals.

August 15, 1938.

[fol. 64] EXHIBIT "C" TO PETITION

UNITED STATES OF AMERICA:

BEFORE THE NATIONAL LABOR RELATIONS BOARD

At a regular meeting of the National Labor Relations Board, held at its office in the City of Washington, D. C., on the 27th day of August, 1938.

Present: J. Warren Madden, Chairman; Donald Wakefield Smith.

Case No. R-638

In the Matter of SHIPOWNERS' ASSOCIATION OF THE PACIFIC COAST, WATERFRONT EMPLOYERS ASSOCIATION OF THE PACIFIC COAST, THE WATERFRONT EMPLOYERS OF SEATTLE, THE WATERFRONT EMPLOYERS OF PORTLAND, THE WATERFRONT EMPLOYERS ASSOCIATION OF SAN FRANCISCO, THE WATERFRONT EMPLOYERS ASSOCIATION OF SOUTHERN CALIFORNIA, and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, DISTRICT No. 1

Case No. R-572

In the Matter of WATERFRONT EMPLOYERS ASSOCIATION OF SOUTHERN CALIFORNIA and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 1-13

ORDER OVERRULING OBJECTIONS AND EXCEPTIONS AND DENYING MOTION

The Board having issued a Decision and Certification of Representatives in the above-entitled proceeding, and, there-

after American Federation of Labor, International Longshoremen's Association, West Coast Locals, having filed objections and exceptions to said Certification, and a motion for a rehearing and reconsideration of said Decision and for a reversal of said Certification, and the Board having duly considered the matter,

It is Hereby Ordered that said objections and exceptions be, and they hereby are, overruled, and that said motion be, and it hereby is, denied.

By direction of the Board:

Beatrice M. Stern, Assistant Secretary.

[fol. 65] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

AMENDMENT TO PETITION TO REVIEW AND SET ASIDE ORDER OF NATIONAL LABOR RELATIONS BOARD DATED JUNE 21ST, 1938—Filed October 21, 1938

Comes now, American Federation of Labor, International Longshoremen's Association, and Pacific Coast District International Longshoremen's Association No. 38, the petitioners in the above entitled action and amend paragraph 8 of its Petition to Review and Set Aside Order of National Labor Relations Board Dated June 21st, 1938, heretofore filed herein, by adding under said paragraph 8, the following:

"That on the 30th day of September 1938, pursuant to and in accordance with said order and decision, the said International Longshoremen's and Warehousemen's Union, District #1, as exclusive bargaining agent and representative of longshore employees employed by all employers, engaged in the handling or transportation of water-borne cargo on the Pacific Coast of the United States, through its president, Harry R. Bridges, entered into a collective bargaining agree-[fol. 66] ment respecting wages, hours and working conditions with the Ship Owners Association of the Pacific Coast on behalf of the Waterfront Employers of Seattle, the

Waterfront Employers of Portland, the Waterfront Employers Association of San Francisco and the Waterfront Employers Association of Southern California, through its president, R. W. Myers. That said contract provided among other things, that preferential employment be given members of the said International Longshoremen's and Warehousemen's Union, District #1, by said employers' associations. That said Employer Associations aforenamed have recognized the International Longshoremen's and Warehousemen's Union affiliate of the Committee of Industrial Organization as the exclusive bargaining agent of all longshore employees on the Pacific Coast. That by virtue of the decision and order of the Board and by virtue of Section 8 (3) of the Act the International Longshoremen's and Warehousemen's Union and the Employers Association may enter into a so-called closed shop contract whereby employees who are members of the International Longshoremen's Union affiliate of American Federation of Labor may be discharged and their jobs replaced by members of the International Longshoremen's and Warehousemen's Union.

Dated, October 18, 1938.

Herbert S. Thatcher, Joseph A. Padway, Counsel for Petitioners.

[fol. 67] AFFIDAVIT OF SERVICE UPON NATIONAL LABOR RELATIONS BOARD OF AMENDMENT TO PETITION TO REVIEW AND SET ASIDE ORDER OF NATIONAL LABOR RELATIONS BOARD, DATED JUNE 21st, 1938

William K. Sherwood, of lawful age, upon his oath, declares and states, that he is a resident of the District of Columbia, and that on the morning of October 21st, 1938, he did serve personally upon Mr. Holliday, attorney for the National Labor Relations Board, two copies of the Amendment to Petition to Review and Set Aside Order of National Labor Relations Board dated June 21st, 1938, in the case of American Federation of Labor, International Longshoremen's Association and Pacific Coast District International Longshoremen's Association No. 38, Petitioners, vs. National Labor Relations Board, Respondent, in the

United States Court of Appeals, for the District of Columbia, April Term 1938, No. 7257.

William K. Sherwood.

Subscribed and sworn to before me this 21st day of October, 1938. Thomas L. Kelly, Notary Public for the District of Columbia. My Commission expires July 1, 1940. (Seal.)

[fol. 68] IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

MOTION UNDER SPECIAL APPEARANCE (MOTION TO DISMISS)—Filed October 22, 1938

To the Honorable, The Judges of the United States Court of Appeals, for the District of Columbia:

Now comes the National Labor Relations Board, hereinafter referred to as the Board, by its attorneys, appearing specially, and moves the Court to dismiss the petition to review and set aside the Board's decision and certification, and for its grounds, respectfully states as follows:

1. Petitions having been filed alleging that a question affecting commerce had arisen concerning representation of employees and requesting an investigation and certification of representatives, the Board on June 21, 1938, pursuant to Section 9 (c) of the National Labor Relations Act, 49 Stat. 449, hereinafter referred to as the Act, duly issued a Decision and Certification of Representatives in the proceeding before it entitled *"In the Matter of Shipowners' Association of the Pacific Coast, Waterfront Employers Association of the Pacific Coast, The Waterfront Employers of Seattle, The Waterfront Employers of Portland, The Waterfront Employers Association of San Francisco, The Waterfront Employers Association of Southern California,* [fol. 69] *and International Longshoremen's and Warehousemen's Union, District No. 1; In the Matter of Southern California and International Longshoremen's and Warehousemen's Union, Local 1-13"*—Cases Nos. R-638 and R-

572. Said Decision and Certification of Representatives was made at the end of an investigatory proceeding, duly undertaken by the Board, pursuant to the provisions of Section 9 (c) of the Act.

2. On August 15, 1938, American Federation of Labor, International Longshoremen's Association, and Pacific Coast District of International Longshoremen's Association No. 38, petitioners herein, filed a motion with the Board for a rehearing and reconsideration of said cases, and set forth therein certain objections and exceptions to said Decision and Certification of Representatives.

3. On August 27, 1938, the Board overruled the petitioners' said objections and exceptions, and denied said motion.

4. Thereafter, on September 29, 1938, petitioners filed in this Court their petition to review and set aside said Decision and Certification of the Board dated June 21, 1938.

5. The jurisdiction of the United States Circuit Courts of Appeals and the United States Court of Appeals for the District of Columbia is obtained solely by virtue of Acts of Congress. The National Labor Relations Act is the only Act of Congress which grants jurisdiction to the United States Circuit Courts of Appeals and to the United States Court of Appeals for the District of Columbia to review actions of the Board, and which contains provisions for such review. Review is accordingly limited to the provisions of that Act.

6. This Court has no jurisdiction to entertain the petition herein, or to grant the prayers thereof. Sections 10 (e) and 10 (f) are the only sections of the National Labor Relations Act granting jurisdiction to the Circuit Courts of Appeals and the Court of Appeals for the Dis-
[fol. 70] trict of Columbia to review actions of the Board. Of these, Section 10 (e) applies solely to reviews sought by the Board.

7. Section 10 (f), as well as 10 (e), applies only to the review of orders of the Board issued under Section 10 (c) of said Act, requiring employers to cease and desist from unfair labor practices prohibited by Section 8. The action of the Board in the matter now sought to be reviewed did not relate to any alleged unfair labor practice under Sec-

tion 8 of the Act, did not and could not lead to any cease and desist order under Section 10 (c) of said Act, relating to such unfair labor practices, and in no way comes within the limited review afforded with respect to cease and desist orders of the Board by Section 10 (f) of the Act.

8. This Court has no jurisdiction to entertain the petition herein, or grant the prayers thereof, because the certification of representatives duly issued by the Board was pursuant to a proceeding under Section 9 (c) of the Act, a purely fact-finding investigation resulting in no order or compulsion against any one, and reviewable only as expressly provided in Section 9 (d) of the Act, in connection with a cease and desist order issued under Section 10 (c) of said Act. No such cease and desist order has or could have been made in the investigation proceeding which the Board conducted.

9. The legislative history of the Act makes it clear that it was the intention of Congress that certifications by the Board prior to an order made with respect to unfair labor practices should not be subject to judicial review. In its report on the bill, the Senate Committee on Education and Labor stated:

"Section 9 (c) empowers the National Labor Relations Board, whenever a question * * * affecting commerce arises concerning the representation of employees, to conduct an investigation either by secret ballot or otherwise to determine such representatives. In any such investigation, an appropriate hearing must be held.

[fol. 71] "Section 9 (d) makes it absolutely clear that there shall be no right to court review anterior to the holding of an election. An election is the mere determination of a preliminary fact, and in itself has no substantial effect upon the rights of either employers or employees. There is no more reason for court review prior to an election than for court review prior to a hearing. *But if subsequently the Board makes an order predicated upon the election, such as an order to bargain collectively with elected representatives, then the entire election procedure becomes part of the record upon which the order of the Board is based, and is fully reviewable by any aggrieved party in the Federal Courts in the manner provided for in Section 10. And this review would include within its scope the action of the*

Board in determining the appropriate unit for purposes of the election. This provides a complete guarantee against arbitrary action by the Board." (74th Cong., 1st Sess., Senate Report No. 573, p. 14.)

The report of the House Committee on Labor is to the same effect:

"As previously stated in this report, the efficacy of Public Resolution 44 has been substantially impaired by the provision for court review of election orders prior to the holding of the election. Section 9 (d) of the bill makes clear that there is to be no court review prior to the holding of the election, and provides an exclusive, complete, and adequate remedy *whenever an order of the Board made pursuant to Section 10 (c) is based in whole or in part upon facts certified following an election or other investigation pursuant to Section 9 (c).* The hearing required to be held in any such investigation provides an appropriate safeguard and opportunity to be heard. Since the certification and the record of the investigation are required to be included in the transcript of the entire record filed pursuant to section 10 (e) or (f), the Board's actions and determinations of fact and law in regard thereto will be subject to *the same court review as is provided for its other determinations under Sections 10 (b) and 10 (c).*" (74th Cong., 1st Sess., House Report No. 1147, p. 23.)

10. Section 9 (d) of the National Labor Relations Act provides that whenever an order involving an unfair labor practice shall be made by the Board under Section 10 (c), based upon facts certified following an investigation under 9 (c), and there is a petition to enforce or review such order made under Section 10 (c) the decree of the Court shall be made and entered on the transcript of the record of the entire proceeding, which shall include the certification and the record of the investigation under 9 (c).

[fol. 72] 11. Section 9 (d) does not provide for the judicial review of the proceedings under 9 (c); Section 9 (d) clearly shows that proceedings undertaken pursuant to Section 9 (c), the type involved herein, may be judicially reviewed only when the Board has issued a cease and desist order in an unfair labor practice case under 10 (c) and furthermore, only when such cease and desist order is based upon

facts certified by the Board pursuant to an investigation under 9 (c).

12. The Board has not instituted any proceeding or issued any cease and desist order against the petitioners, or other parties to the proceedings before it, under Section 10 in respect to any unfair labor practice. Until such order is issued, based upon the proceedings here involved, there can be no jurisdiction in this Court to review.

13. All that the certification of representatives made by the Board under Section 9 (c) amounts to is an announcement or statement of the results of its research and investigation as to what representatives have been designated or selected by the particular employees concerned. Such an announcement or statement is not an order in the judicial sense, or at all. It is but the formal record of the Board's conclusions reached in the exercise of the power of investigation.

Wherefore, the Board respectfully moves that the petition to review and set aside the Board's decision and certification be dismissed.

Robert B. Watts, (M. F. H.), Associate General Counsel for Respondent, National Labor Relations Board, Appearing Specially; Malcolm F. Halliday, Attorney for Respondent, National Labor Relations Board, Appearing Specially.

[fol. 73] [File endorsement omitted.]

[fol. 74] IN UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA

[Title omitted]

MINUTE ENTRY OF ARGUMENT—December 5, 1938

The argument on the motion to dismiss in the above entitled cause was commenced by Mr. Laurence A. Knapp, attorney for respondent, continued by Mr. Joseph A. Padway, attorney for petitioner, and concluded by Mr. Laurence A. Knapp, attorney for respondent.

[fol. 75] IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 7257

AMERICAN FEDERATION OF LABOR et al., Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

On Petition to Review and Set Aside Order of the National Labor Relations Board

(Argued December 5, 1938. Decided February 27, 1939)

Herbert S. Thatcher and Joseph A. Padway, both of Washington, D. C., for petitioners.

Robert B. Watts and Laurence A. Knapp, both of Washington, D. C., for respondent.

Before Groner, C. J., and Miller and Vinson, JJ.

OPINION

GRONER, C. J.:

International Longshoremen's Association is a labor organization whose members are engaged in longshore work on the Pacific Coast. International Longshoremen's Association Local 38 is a similar organization affiliated with International, and International in turn is affiliated with the American Federation of Labor. In the latter part of September, 1938, petitioner filed its petition in this court to review and set aside an order of the National Labor Relations Board made June 21, 1938. The controversy concerns the rival claims of the American Federation of Labor and the Committee for Industrial Organization (C. I. O.) and their respective affiliates to represent maritime workers in interstate and foreign commerce in some or all of the ports on the Pacific Coast. The dispute arose as the result of the filing by the C. I. O. of a petition asking the Board to hold that the employer unit should embrace the entire West Coast and to certify its affiliate as exclusive bargaining agent. The A. F. of L. answered the petition, denying the Board's power to prescribe a unit larger than a single employer. There were lengthy hearings before the Board at which both parties were represented, and many witnesses examined.

Subsequently, on the 21st of June, the Board made elaborate findings of fact and conclusions of law, and issued its certificate. The decision united in one unit some 200 or more employers operating in different ports from Canada to Mexico and found that C. I. O. organizations represented the majority of the employees of the whole. The employers accepted the certification without question and made a collective bargaining contract in which the C. I. O. was recognized as the exclusive representative of all West Coast longshore employees. A. F. of L (and its affiliates) petitioned the Board for a rehearing. The Board adhered to its former decision, and denied the petition. This appeal followed. The Board appeared and filed what it calls a "special appearance," objecting to the jurisdiction of this court to hear the appeal, and moved to dismiss.

[fol. 76] The question in the case is whether the decision appealed from is a "final order" within the terms of the Act.[1] As a preliminary question, the Board argues that petitioner is without any standing to appeal regardless of whether the order is final or not, but we think the language of Section 10(f) of the Act sufficiently answers this contention. It authorizes a review at the instance of "any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought." The right under this section has already been invoked without question by labor unions in a number of case,[2] and if the Act should be held to confine the right of review to an employer and to deny it to a representative of the employees, it would create an anomalous situation. We think the fair intendment of the language as well as the purpose of Congress was to provide a judicial review to any aggrieved party where the order is final, without narrowing it in the manner now contended for by the Board. In this view we have a case in which the right, called by the Supreme Court in Texas & New Orleans Railroad Co. v. Brotherhood of Ry. & S. S. Clerks, 281 U. S. 548, 571, a property right, is charged to have been wholly destroyed by the action of the Board.

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[1] National Labor Relations Act, 49 Stat. 449, 29 U. S. C. (Supp. IV), secs. 151 et seq.

[2] See particularly Consolidated Edison Co., et al. v. National Labor Relations Board, et al., and International Brotherhood of Electrical Workers, et al. v. National Labor Relations Board, — U. S. — (decided December 5, 1938).

The principal loading and discharging ports on the Pacific Coast are Tacoma, Olympia, Port Angeles, San Francisco, Los Angeles, Seattle, and Portland. There are about 25 smaller ports, and the total number of employees is stated to be in the neighborhood of 13,000. The number of employers varies with the size of the ports, but altogether they total several hundred, and they in turn are represented by some four or five associations of employers, and there are separate employer associations in most of the ports. When the Board's hearings were begun, petitioner represented a majority of the employees in one or more of the ports and likewise a majority of the employees of a number of separate employers. Petitioner's grievance grows out of the fact that in ascertaining the appropriate representative of the men the Board ignored the identity of separate employers or of separate ports and extended the employer unit to include the entire Pacific Coast, with the result that the rival union was designated and certified as the sole representative—in consequence of which its own union was "put out of business" and its members obliged to become members of its rival and deal with the employer either exclusively through it or not at all.[3] In short, that by reason of the [fol. 77] Board's decision to enlarge the "unit" to embrace about 25 separate ports and the acceptance of its decision by the employers, a situation has arisen as the result of which a so-called closed shop contract may be entered into which will require petitioner's members, even where they predominate in a particular locality or business, to join the

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[3] Sec. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

other union or possibly be displaced from their employment by members of that union.

Enough has been said to show that we have here a controversy between two national labor organizations, both of which have appealed to the Board to resolve their conflicting rights and the rights of their members, and one of which claims that the unlawful action of the Board in the designation of an employer unit beyond the terms of the Act has destroyed its property right and the property rights of its members and that, unless it can obtain a review by appeal to this court or some other Circuit Court of Appeals, it will be wholly without redress of any kind.

The Board denies jurisdiction on the ground that the action taken by it was the result of proceedings investigatory in character; that the Act in the circumstances did not contemplate the issuance of any order, final or otherwise; that its finding and decision do not require petitioner to do anything or to refrain from doing anything; and that petitioner is, therefore, not a person aggrieved nor the decision appealed from a final order which will confer jurisdiction upon a court.

Petitioner concedes that it is not entitled to a judicial review unless there was a final order, but insists that in the facts narrated above the decision and the so-called certificate entered thereon constitute a final order; that its effect is to completely foreclose and determine its legal rights and to leave it without redress of any kind unless this review is open to it.

The Supreme Court has held in a number of cases that mere preliminary or procedural orders of an administrative body are not reviewable by the Circuit Courts of Appeals, and this brings us to our starting point, namely, whether what happened here was in effect a final order commanding or directing something to be done. In the case of Mallory Coal Company v. National Bituminous Coal Commission, 99 F. 2d. 399, we endeavored to review this question in the light of the decisions of the Supreme Court and to lay down a test as a guide to ourselves in determining the question. We said:

Underlying all these tests of appellate jurisdiction is the fundamental requirement that the person seeking review must first have exhausted his administrative remedy. If the order in the particular case is definitive rather than preliminary or procedural; if the order operates particularly

upon the person seeking review, rather than upon the world generally or upon a large group of interested persons; if the order was entered in a proceeding, adversary in character, after notice given, with a hearing at which witnesses were examined and points of law argued, and in which findings of fact were made; if a petition for rehearing was filed urging, upon the Commission, the objection to the order now urged for the consideration of the court; each of these circumstances—and more particularly all of them together—may indicate that the administrative remedy has been exhausted and that it is time for judicial review. Until that time comes, the matter should remain in the control of the administrative agency.

[fol. 78] Examined in the light of this formula, the decision of the Board in the case in hand contains all the elements we believed to be necessary to make it reviewable under the statute. The proceeding out of which it emerged was neither preliminary nor incident to another proceeding. It concerned a controversy affecting the vital interests of two rival unions. It was begun and concluded for the purpose of settling the dispute. It was authorized by the statute to be made and so far as concerned the unions it was final. Its actual effect was to eject petitioner from the controversy. The suggestion that petitioner might have induced the employer to reject the finding and subject himself to an unfair labor proceeding and thus secure a court review, is wholly beyond the point. Petitioner had no control of the employer, and here the petition shows that the employer, acting within the spirit as well as the letter of the Act, promptly obeyed the Board's decision and entered into a contract in accordance with its terms. So that what happened was precisely what in a proper case the Act designed should happen—but, as we have seen, with the result that petitioner, in the localities in which its members constituted a majority, was—if the Board's decision as to the representative unit is valid—deprived of the very thing which petitioner insists it was the purpose of Congress to secure and protect. We had thought that whether an order or decree is final is not to be determined by the name which the court or board gives it but should be decided on consideration of its essence, its substance, its intrinsic nature. Or in other words—what is done by it. The decision in question undoubtedly operated particularly upon petitioner. It was an adversary party.

The decision and the refusal to rehear closed the controversy and completely exhausted petitioner's administrative remedies. But, notwithstanding all of this, we think we are bound to hold that the "decision" was not an "order" as that term is defined in Shannahan v. United States, 303 U. S. 596, and in Shields v. Utah Idaho Central Railroad Co., — U. S. — (decided December 5, 1938).

In the Shannahan case the controversy involved the right of an electric railroad to be exempt from the scope of the Railway Labor Act under a proviso excluding street, interurban, or suburban railways. The Act authorized and directed the Interstate Commerce Commission upon request of the Mediation Board to "determine" whether the line fell within the terms of the proviso. The Commission determined it did not. An appeal was taken under the provisions of the Urgent Deficiencies Act to set aside the decision. The Commission challenged jurisdiction of the court on the ground that the "determination" of the Commission was not an order, and on hearing it was so decided and the bill dismissed. On appeal to the Supreme Court the decision was affirmed, and it was said the "determination" was not an order at all and was no more than a "decision on a controverted matter." And in Shields v. Utah Idaho Central Railroad Co., which shortly followed, the Court said a "determination" or "decision" by an administrative body may be definitive, may be legal, and may be binding as to all parties concerned, but it is still not an "order" if it does not also command or direct a particular thing to be done[4]— and, because it is not an order, it is not appealable and is sub- [fol. 79] ject to challenge and judicial review only by bill in equity.

Accepting, as we must, this restrictive definition and applying it to the case at hand, we hold that, though the decision here was required by the Act to be made and to be made on the evidence and argument after judicial hearing, and though it was definitive, adversary, binding, final, and in this case struck at the very roots of petitioner's union and destroyed its effectiveness in a large geographical area of the Nation, it was not an order because the Act did not require it to be made in the language of command, and hence is reviewable—as was held in Shields case, supra, and in Utah Fuel Co. v. National Bituminous Coal Commission,

[4] As was said in the Shannahan case, p. 599.

— U. S. — (decided Jan. 30, 1939)—only in an independent suit in equity commenced in a District Court.

Petition dismissed.

[fol. 80] In United States Court of Appeals for the District of Columbia, January Term, 1939

No. 7257

American Federation of Labor, International Longshoremen's Association, and Pacific Coast District International Longshoremen's Association No. 38, Petitioners,

vs.

National Labor Relations Board

Judgment—February 27, 1939

Petition to review and set aside order of the National Labor Relations Board.

This cause came on to be heard on the petition to review and set aside order of the National Labor Relations Board, and respondent's motion to dismiss, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the petition in this cause be, and it is hereby, dismissed.

Per Mr. Chief Justice Groner.

[fol. 81] Memorandum: Petition for leave to file petition for rehearing, time having expired, Filed May 20, 1939.

[fol. 82] [File endorsement omitted]

In United States Court of Appeals for the District of Columbia

[Title omitted]

Order Denying Leave to File Petition for Rehearing—Filed May 29, 1939

Per Curiam:

Petitioners' application, filed May 20, 1939, calls our attention to a decision of the United States Supreme Court

in Rochester Telephone Corporation v. United States of America and Federal Communications Commission (No. 481, decided April 17, 1939), and insist that it sustains our jurisdiction to hear the instant case on its merits. Petitioners likewise refer to a recent decision of the Sixth Circuit in Libbey-Owens-Ford Glass Co. v. National Labor Relations Board to the same effect.

Our opinion was handed down on February 27, 1939, and our judgment issued on March 17, 1939. Our January Term expired on April 2, 1939, and the present application was filed subsequent to the last-mentioned date and when we have no further power over our judgment. Because of this fact we are without power to reconsider our former decision, and leave to file petition for rehearing is for this reason denied.

It is so ordered this 23d day of May, 1939.

[fol. 83] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed May 24, 1939

The Clerk will please prepare a transcript on application for certiorari to the Supreme Court of the United States in the above entitled cause, including therein the following:

1. The record in the Court of Appeals, (including petition for review, together with amendment thereto, and respondent's Answer and Motion to Dismiss.)
2. Minute entry showing argument of cause.
3. Opinion of the Court.
4. The judgment or decree.
5. Clerk's entry showing filing of Petition for Permission to file Petition to Rehear.
6. Decree of the Court dismissing said Petition for Permission.

7. This designation.
8. Clerk's certificate.

Joseph A. Padway, Herbert S. Thatcher, Attorneys for Petitioners.

Copy received May 24, 1939.
Robert Watts, Assoc. Gen'l Counsel, N. L. R. B.

[fol. 84]. Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1939

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 70

AMERICAN FEDERATION OF LABOR, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AND PACIFIC COAST DISTRICT INTERNATIONAL LONGSHOREMEN'S ASSOCIATION No. 38,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF THEREON.

JOSEPH A. PADWAY,
HERBERT S. THATCHER,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 991

AMERICAN FEDERATION OF LABOR, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AND PACIFIC COAST DISTRICT INTERNATIONAL LONGSHOREMEN'S ASSOCIATION No. 38,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable the Justices of the Supreme Court of the United States:

The petition of the American Federation of Labor, International Longshoremen's Association, and Pacific Coast District International Longshoremen's Association No. 38, all unincorporated associations and labor organizations, by their attorney, Joseph A. Padway, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Co-

lumbia, entered in the above entitled cause on February 27, 1939, dismissing petitioner's petition for review of an order of the National Labor Relations Board dated June 21, 1938.

Statement of the Case.

This was a petition for review filed in the United States Court of Appeals for the District of Columbia under Section 10(f) of the National Labor Relations Act, in which petitioners sought to review and set aside an order of the National Labor Relations Board certifying the International Longshoremen's and Warehousemen's Union, a labor organization affiliated with the Congress for Industrial Organization, as the exclusive bargaining representative for all the longshore employees on the West Coast of the United States. The petitioners were three labor organizations—the Pacific Coast District International Longshoremen's Association No. 38, the International Longshoremen's Association, with which Association No. 38 is affiliated, and the American Federation of Labor, with which both are affiliated. Members of the International Longshoremen's Association are engaged in longshore work on the Pacific Coast and in other portions of the country, and the International Longshoremen's Association had for many years prior to the decision of the Board represented thousands of longshore employees on the Pacific Coast and had set up and maintained many locals in all of the principal West Coast ports.

The respondent, National Labor Relations Board, is a Governmental agency organized under an Act of Congress known as the National Labor Relations Act, 49 Stat. 449.

A dispute having arisen between the International Longshoremen's and Warehousemen's Union, (hereinafter termed the CIO) and the petitioners herein, concerning representation of longshore employees on the West Coast, the CIO petitioned the Board to certify it as exclusive bargain-

ing agent for all longshore employees on the West Coast. Petitioners in their answer denied the Board's power to prescribe a unit larger than the employees of individual employers. After lengthy hearings before the Board at which both parties were represented and many witnesses examined, the Board, on June 21, 1938, made elaborate findings of fact and conclusions of law, and issued its decision and order of certification (see R. 6-58), certifying the CIO as the *exclusive* bargaining agent of all employees of all longshore employers operating in Pacific Coast ports from Canada to Mexico. These employers, of which there were some 200, thereupon entered into a collective bargaining contract with the CIO, through an employer association, in which the CIO was recognized as the exclusive bargaining representative of all West Coast longshore employees, and its members given a preferential employment status.

A petition objecting and excepting to the decision of the Board and asking for a rehearing filed by the petitioners on August 15, 1938, was denied by the Board on August 27, 1938 (see R. 59 & R. 61).

The petitioners then sought to appeal to the United States Court of Appeals for the District of Columbia under Section 10(f) of the National Labor Relations Act as a "person aggrieved by a final order of the Board" (see R. 1-5 & 62). The petition for review alleged generally that the order of certification was contrary to law in that the Act did not give the Board power to prescribe a unit larger than that composing the employees of individual employers, and that as a result of the decision and order of certification, petitioners, although selected by a majority of the employees of a large number of individual employers, and functioning as collective bargaining representative for thousands of longshoremen on the West Coast, were nevertheless unlawfully deprived of their status as collective bargaining agents and were unlawfully deprived of their right to represent long-

shore employees and to engage in business as labor organizations on the entire West Coast of the United States; their membership was being destroyed; their locals were being disrupted; and investments of many thousands of dollars in organizing expenditures, strike and welfare benefits, and maintenance payments made through the years were being lost; and that petitioners were thereby aggrieved by the decision and order of the Board. The respondent, National Labor Relations Board, filed a so-called special appearance objecting to the jurisdiction of the United States Court of Appeals for the District of Columbia to hear the appeal and moved to dismiss the appeal (R. 64). Briefs were filed by both parties and the case was argued December, 1938. On February 27, 1939, the court handed down its decision dismissing petitioners' petition in which it held that the order was not a "final order" within the terms of the Act (see R. 69). In so holding the court freely conceded that, with respect to petitioners, the order was "definitive, adversary, binding, final and in this case struck at the very roots of petitioners' union and destroyed its effectiveness in a large geographical area of the Nation", but felt itself bound to find that the order, not being made in the language of a command, but merely certifying a rival union as exclusive bargaining agent, and hence being in the nature of a "negative order", was not a final order by reason of the decisions of this Court in *Shannahan* v. *United States*, 303 U. S. 596, and in *Shields* v. *Utah Idaho Central Railroad Company*, 305 U. S. 117. These decisions were found by the Circuit Court to hold that: "* * * a 'determination' or 'decision' by an administrative body may be definitive, may be legal, and may be binding as to all parties concerned, but it is still not an 'order' if it does not also command or direct a particular thing to be done". Subsequent to the date of that decision this Court in the case of *Rochester Telephone Corporation* v. *The United States of America and Federal Communications*

Commission, 83 L. Ed. (adv. sheets) 719, decided April 17, 1939, re-examined in its entirety the law relating to appealable orders of administrative bodies and rejected the doctrine of "negative orders". On the 15th day of May, 1939, the Circuit Court of Appeals for the Sixth Circuit in a case entitled *Libbey-Owens-Ford Glass Company, Petitioners*, v. *National Labor Relations Board*, refused to dismiss an appeal from an order of certification in a situation similar to the present one.

Thereupon on the 20th day of May, 1939, petitioners applied to the United States Court of Appeals for the District of Columbia for permission to file a petition for rehearing, which petition was denied on the 24th day of May, 1939, for the sole reason that the term of court in which the decision was made having expired April 1, 1939, the Circuit Court was without jurisdiction to entertain a petition for rehearing (see R. 75).

The single issue on this appeal is whether the order of the Board certifying the CIO as the exclusive bargaining agent for all West Coast longshore employees is a final and reviewable order.

Reasons for Allowance of the Writ.

The grounds relied on by the petitioners for the allowance of the writ are:

1. The decision of the Court of Appeals for the District of Columbia is contrary to the provisions of the National Labor Relations Act, particularly Section 10(f) thereof;[1]

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[1] Sec. 10 (f) of the N. L. R. A., so far as relevant, reads as follows:

"Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside."

2. The decision is in conflict with the decision of this Honorable Court in the case of *Rochester Telephone Corporation* v. *The United States of America et al.*, 83 L. Ed. (adv. sheets) 719.

3. The decision is predicated on an erroneous conception by the court below of the holding of this Court in the cases of *Shannahan* v. *United States*, 303 U. S. 596, and *Shields* v. *Utah Idaho Central Railroad Company*, 305 U. S. 177.

4. The decision is in conflict with a decision on the same matter involving the identical issue decided by the Circuit Court of Appeals for the Sixth Circuit in the case entitled *Libbey-Owens-Ford Glass Company* v. *N. L. R. B.*, decided May 20, 1939.

5. The case involves in its essential features the rights of labor organizations to appeal from decisions of the National Labor Relations Board prescribing appropriate bargaining units which it is alleged are prescribed contrary to the power conferred on the Board by the Act, which decisions certify rival labor organizations as exclusive bargaining agents thus depriving said labor organizations of the right to represent employees and otherwise to carry on their business as labor organizations in various localities, and depriving them of various property rights. A decision on this question is of vital importance to all labor organizations throughout the country, such orders involving as they do in many cases an abrogation of the very existence of labor unions.

Prayer.

WHEREFORE your petitioners respectfully pray that writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the District of Columbia, commanding that court to certify to and send to this Court for its review and determi-

nation, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, April Term, 1938, No. 7257, American Federation of Labor, International Longshoremen's Association, and Pacific Coast District International Longshoremen's Association No. 38, petitioners, *vs.* National Labor Relations Board, respondent, and that the judgment and decree of the United States Court of Appeals for the District of Columbia may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just and your petitioners will ever pray.

AMERICAN FEDERATION OF LABOR,
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
PACIFIC COAST DISTRICT INTERNATIONAL LONGSHOREMEN'S ASSOCIATION No. 38,
By JOSEPH A. PADWAY,
HERBERT S. THATCHER,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 991

AMERICAN FEDERATION OF LABOR, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AND PACIFIC COAST DISTRICT INTERNATIONAL LONGSHOREMEN'S ASSOCIATION NO. 38,

Petitioners,

vs

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinion of the Court.

The opinion of the United States Court of Appeals for the District of Columbia, filed on February 27, 1939, is printed in the record filed herein at R. 69-75.

Jurisdiction.

1. The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code as amended. The date of the judgment of the United States Court of Appeals to be reviewed is February 27, 1939.

2. This case devolves upon an interpretation of the National Labor Relations Act.

3. The decision of the United States Court of Appeals is in direct conflict with applicable decisions of your Honorable Court and a decision on the same matter decided by another Circuit Court of Appeals.

Statement of the Case.

The foregoing petition for writ of certiorari contains a concise statement of the case and in the interest of brevity such statement will not be repeated here.

Specification of Error.

1. The United States Court of Appeals for the District of Columbia erred in dismissing petitioners' petition to review and set aside an order of the National Labor Relations Board on the ground that although the said order was final, adversary, binding, definitive, and destructive of petitioners' property rights, it was not a "final" order because it was not made in the language of a command and did not command or direct a particular thing to be done, and in relying on the opinions of this Court in the *Shannahan* v. *U. S.*, (303 U. S. 596), and *Shields* v. *Utah Idaho Central R. R. Co.* (305 U. S. 177), cases in support of said determination.

2. The decision of the court below is contrary to the decision of this Court in *Rochester Telephone Corporation* v. *The United States of America et al.*, 83 L. Ed. (adv. sheets) 719, in which the doctrine of "negative orders" was rejected and in which it was held that the substance rather than the form of the order sought to be renewed was the determining factor.

3. The decision of the court below is contrary to a decision of the Circuit Court of Appeals for the Sixth Circuit permitting an appeal in a case similar to the present case.

ARGUMENT.

A. The Order of Certification is Definitive, Adversary, Binding and Final.

It will accomplish no good to argue at length that the present order [2] is at least in substance and effect a final, definitive order. The lower court so held, and the following portions of the decision are quoted in connection with this point:

> "• • • Enough has been said to show that we have here a controversy between two national labor organizations, both of which have appealed to the Board to resolve their conflicting rights and the rights of their members, and one of which claims that the unlawful action of the Board in the designation of an employer unit beyond the terms of the Act has destroyed its property rights and the property rights of its members and that, unless it can obtain a review by appeal to this Court or some other Circuit Court of Appeals, it will be wholly without redress of any kind.
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> "The Supreme Court has held in a number of cases that mere preliminary or procedural orders of an ad-

[2] The Board's Order of Certification together with the conclusions of law on which it is based are as follows:

Conclusions of Law.

1. A question affecting commerce has arisen concerning the representation of longshoremen in the Pacific Coast ports of the United States, within the meaning of Section 9(c) and Section 2(6) and (7) of the National Labor Relations Act.

2. The workers who do the longshore work in the Pacific Coast ports of the United States for the companies which are members of Waterfront Employers of Seattle, Waterfront Employers of Portland, Waterfront Employers Association of San Francisco, Waterfront Employers Association of Southern California, and Shipowners' Association of the Pacific Coast, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the National Labor Relations Act.

3. International Longshoremen's and Warehousemen's Union, District No. 1, is the exclusive representative of all the workers in such unit for

ministrative body are not reviewable by the Circuit Court of Appeals, and this brings us to our starting point, namely, whether what happened here was in effect a final order commanding or directing something to be done. In the case of *Mallory Coal Company* v. *National Bituminous Coal Commission*, 99 F. (2d) 339, we endeavored to review this question in the light of the decisions of the Supreme Court and to lay down a test as a guide to ourselves in determining the question. We said:

'Underlying all these tests of appellate jurisdiction is the fundamental requirement that the person seeking review must first have exhausted his administrative remedy. If the order in the particular case is definitive rather than preliminary or procedural; if the order operates particularly upon the person seeking review; rather than upon the world generally or upon a large group of interested persons; if the order was entered in a proceeding, adversary in character, after notice given, with a hearing at which witnesses were examined and points of law argued, and in which findings of fact were made; if a petition for rehearing

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the purposes of collective bargaining, within the meaning of Section 9(a) of the National Labor Relations Act.

Certification of Representative.

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9(c) of the National Labor Relations Act, and pursuant to Article III, Section 8, of National Labor Relations Board Rules and Regulations—Series 1, as amended,

It Is Hereby Certified that International Longshoremen's and Warehousemen's Union, District No. 1, has been designed and selected by a majority of the workers who do longshore work in the Pacific Coast ports of the United States for the companies which are members of Waterfront Employers of Seattle, Waterfront Employers of Portland, Waterfront Employers Association of San Francisco, Waterfront Employers Association of Southern California, and Shipowners' Association of the Pacific Coast, as their representative for the purposes of collective bargaining, and that, pursuant to the provisions of Section 9(a) of the Act, International Longshoremen's and Warehousemen's Union, District No. 1, is the exclusive representative of all such workers for the purposes of collective bargaining, in respect to rates of pay, wages, hours of employment and other conditions of employment.

was filed urging, upon the Commission, the objection to the order now urged for the consideration of the courts; each of these circumstances—and more particularly all of them together—may indicate that the administrative remedy has been exhausted and that it is time for judicial review. Until that time comes, the matter should remain in the control of the administrative agency.'

Examined in the light of this formula, the decision of the Board in the case in hand contains all the elements we believed to be necessary to make it reviewable under the statute. The proceeding out of which it emerged was neither preliminary nor incident to another proceeding. It concerned a controversy affecting the vital interests of two rival unions. It was begun and concluded for the purpose of settling the dispute. It was authorized by the statute to be made and so far as concerned the unions it was final. Its actual effect was to eject petitioner from the controversy. The suggestion that petitioner might have induced the employer to reject the finding and subject himself to an unfair labor proceeding and thus secure a court review, is wholly beyond the point. Petitioner had no control of the employer, and here the petition shows that the employer, acting within the spirit as well as the letter of the Act, promptly obeyed the Board's decision and entered into a contract in accordance with its terms. So that what happened was precisely what in a proper case the Act designed should happen—but, as we have seen, with the result that petitioner, in the localities in which its members constituted a majority, was—if the Board's decision as to the representative unit is valid—deprived of the very thing which petitioner insists it was the purpose of Congress to secure and protect. We had thought that whether an order or decree is final is not to be determined by the name which the court or board gives it but should be decided on consideration of its essence, its substance, its intrinsic nature. Or in other words —what is done by it. The decision in question un-

doubtedly operated particularly upon petitioner. It was an adversary party. The decision and the refusal to rehear closed the controversy and completely exhausted petitioner's administrative remedies * * *."

As the court below has recognized, petitioners, by reason of the Board's decision and order certifying a competing and rival union as the exclusive bargaining agency for all longshore employees in a large geographical section of the United States, are effectively eliminated from engaging in their business of representing longshore employees in that district. The order has as effectively deprived petitioners of their status as a collective bargaining representative as if they, themselves, had been ordered to quit doing business on the West Coast. The employers, through an association, have entered into a contract with the CIO unions, giving the CIO members a preferential employment status, and, for all that petitioners have power to prevent, an out and out closed shop contract may likewise be entered into, thereby not only depriving petitioners of their right to engage in business as labor organizations, but, what is worse, also depriving their members of their very livelihood.

The single question in this case is whether the United States Court of Appeals was correct in determining that, although all of the other factors of a final order were present, because the order did not command or direct a particular thing to be done—because it was not made in the language of a command—it is not appealable, and whether the *Shannahan* and *Shields* cases, under which the Court of Appeals felt bound to decide the order was not a final one, did in fact require the lower court to hold as it did.

B. Shannahan and Shields Cases Are Not Determinative.—The court below in holding the order of certification not to be a reviewable order predicated its decision solely upon the holding of this Court in the *Shannahan* and *Shields*

cases. The lower court took the view that these two decisions held that an order of an administrative agency to be reviewable must "be made in the language of a command"—that the "order" besides being definitive, final and binding must "also command or direct a particular thing to be done". It is submitted that the court erred in its interpretation of these two cases. The orders in the *Shannahan* and *Shields* cases were held to be non-reviewable solely because of the fact that the effectiveness of the orders involved depended on some further, future action to be taken by that or another administrative body.

In the *Shannahan* case, the Interstate Commerce Commission had determined upon application of the National Mediation Board that the Chicago, South Shore and South Bend Railroad was not within a *proviso* exempting certain street railways from the Railway Labor Act and that the railroad was subject to the Railway Labor Act. Before any affect or adverse result could obtain from this finding an additional proceeding would have to be instituted by the Mediation Board at sometime in the future. Until that was done no status or right was in any way affected.

In the *Shields* case, which was based solely on the *Shannahan* case, the Interstate Commerce Commission had found that the Utah Idaho Central Railroad Company, like the Chicago, South Shore and South Bend Railroad involved in the *Shannahan* case, was not within the exemption of certain street railways from the Railway Labor Act, and that the Railroad was subject to the Railway Act. The court found that the Commission's determination was binding and final but was not an order which could be appealed for the reasons stated in the *Shannahan* case. In the *Shields* case, however, the Mediation Board pursuant to the Interstate Commerce Commission's findings had ordered the carrier to post a notice that labor disputes would be handled under the Railway Labor Act. Disobedience of this order

was punishable in a criminal suit by the United States Attorney. The court accordingly permitted the petitioner relief under the equity jurisdiction of a District Court. Both of these cases, however, go no further than to state that where "the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action," then it is not a final order reviewable by the Circuit Courts. This is the view of those decisions taken by this Court in the case of *Rochester Telephone Corporation* v. *The United States of America et al.*, 83 L. Ed. (adv. sheets) 719, (see page 722, of the adv. sheets, and note 8).

In the present case, the determination that all longshore employees on the entire West Coast constituted a single appropriate bargaining unit and the order certifying the CIO as the exclusive bargaining agent does not depend for its effectiveness on any future action by the Board in so far as the petitioning unions are concerned. The finding is not one which, as in the *Shannahan* case, merely made complainant amenable to orders of an administrative body in the future. Petitioners' status as longshore employees representative on the West Coast has not only been altered but entirely destroyed. Neither the National Labor Relations Act nor any other Act requires, intends, or even contemplates any further action so far as concerns petitioners. The employers have chosen to regard the order, and, having entered into contracts with the CIO, have finally and conclusively destroyed petitioners' right to represent employees of individual employers. It is hardly to be thought that this Court intended in the *Shannahan* and *Shields* cases to disagree with the opinion of Chief Justice Groner in the decision below when he states that:

> "We had thought that whether an order or decree is final is not to be determined by the name which the Court gives it but should be decided on consideration of its essence, its substance, its intrinsic nature. Or in

other words—what is done by it. The decision in question undoubtedly operated particularly upon petitioner. It was an adversary party. The decision and the refusal to rehear closed the controversy and completely exhausted petitioner's administrative remedies."

Further, it can well be argued that any thought that the *Shannahan* case might regard form rather than substance is removed by the opinion of this Court in the *Rochester Telephone Corporation* case, classifying the *Shannahan* and the *Shields* cases as within that group of negative order cases non-reviewable solely because dependent upon the contingency of future administration action, and overruling the case of *Lehigh Valley Railway Company* v. *U. S.*, 243, U. S. 412, 61 L. Ed. 819, on which the *Shannahan* case depended in no small measure. The *Rochester* case clearly affirms Chief Justice Groner's opinion that the substance rather than the form of an order shall determine its effect as a final and reviewable one. Any possible holding in the *Shannahan* or *Shields* cases which is contrary to this is overruled by the decision of this Court in the *Rochester* case.

C. The Rochester Case is Determinative of the Present Issue.

This Court, in the *Rochester* case decided April 14, 1939, involving an appeal from a finding of the Federal Communications Commission that the Rochester Telephone Corporation was subject to its jurisdiction because it was under the control of an interstate company, re-examined in its entirety the law relating to appealable order of administrative bodies, and rejected the doctrine of "negative orders" as being "as unilluminating and mischief making a distinction as the outmoded line between 'non-feasance' and 'misfeasance' ". After discussing the decisions relating to "negative orders", which this Court divided into three groups, the Court found that there were two fundamental prerequisites to judicial review of orders of administrative

bodies. The first is the primary jurisdiction doctrine which requires that matters which call for technical knowledge pertaining to the particular subject which the administrative body in question was set up to administer must first be passed upon by that body. In the present case all technical matters and all matters peculiarly within the knowledge of the National Labor Relations Board have been first passed upon by that Board. The Appellate Court is not being asked to pass upon any matter of a technical nature requiring specialized knowledge. The second doctrine is that of administrative finality which states that the range of issues upon review must be narrowed to "questions affecting constitutional power, statutory authority and the basic prerequisites of proof". In the present case the review is limited solely to the question of whether the National Labor Relations Board has power under the Act to prescribe a collective bargaining unit larger than the employees of an individual employer.

This Court in the Rochester decision plainly indicated that in the future it will regard the substance rather than the form of the particular order sought to be reviewed and that if as a practical matter property rights were threatened or destroyed, a status was altered, or a right withdrawn, the order would be reviewed no matter in what form it might have been made. In particular this Court held that one test which could be derived from previous cases "is that an order is affirmative if it has the legal affect of changing the *status quo*, permitting what was previously not allowed or compelling what was previously not required." Under this test the order here complained of is certainly a final and reviewable one; for a *status quo* in which petitioners represented thousands of employees of various employers operating on the West Coast and in some instances represented every employee of each and every employer in entire ports, is destroyed by the Board's order certifying a rival union as the exclusive bargaining

agent for all longshore employees on the entire West Coast. The present order "compels what was previously not required" by requiring all employers to deal exclusively with one labor organization, whereas previously each was free to deal with whom it pleased.

If it be argued that the order in the present case is not enforcible by the National Labor Relations Board, it can be stated in reply, first, that this Court expressly held in the *Rochester* case that an order no longer need be enforcible by the administrative body making the order to be reviewable, and second, that the order is in fact enforcible by the Board for the reason that had the employers refused to deal with the CIO union which had been designated by the Board as exclusive bargaining agent, unfair labor practice proceedings could have been commenced against the employers and the employers found to have violated the Act and ordered to cease and desist under penalty of being cited for contempt of court upon application to a Circuit Court. In this connection it should be remembered that a labor organization, unlike an employer, does not have available the remedy of disregarding a determination by the Board and defending against enforcement proceedings on the ground that it was erroneous. If the employer acquiesces the decision is final as to that labor organization. See Matter of *Wallach's, Inc.*, v. *Boland*, 253 App. Div. 371, 373, 2 N. Y. (2d) 179, 191 (1st Dep't 1938, aff'd 277 N. Y. 345, 14 N. E. (2d) 381 (1938). It is fatuous to say that, merely because contempt orders cannot be directed against labor organizations, its rights and status cannot be as effectively interfered with by contempt orders directed against those with whom it is its business to deal.

In the *Rochester* case this Court classified certain formerly non-reviewable "negative orders" into two groups. After discussing the decisions and overruling the *Lehigh*

Valley case [3] typifying one group and the *Procter & Gamble* case [4] typifying the other, the court arrived at the conclusion that a review of such orders might properly now be had. In one group (called group 2 in the decision) are orders which have the effect of placing the complainant either inside or outside of a statute or of statutory command. It can be argued by analogy that the present case belongs within this group. Here the decision has the affect of placing third parties, the employers, with whom petitioners must deal, within reach of the Board's order, and thus placing petitioners within the ambit of Board control.

It can be said with more certainty, however, that the order in the present case comes within the third classification of what were formerly termed "negative orders." This group includes orders refusing to forbid or compelling conduct by third parties. In the present case the order complained of refused to compel certain conduct by third parties, the employers, *i. e.*, refused to prescribe the unit contended by petitioners, the single employer unit, as being the largest unit authorized under the statute, thereby refusing to compel the individual employers to bargain with the representative, the petitioners, chosen by employees in single employer units.

But regardless of whether the present order comes within either of the two classifications of orders now found to be reviewable, it is submitted that the essence of the *Rochester* case, which is that the substance rather than the form of an order complained of shall prevail, is determinative of the present issue. The order of the Board now before this Court, whether it be called "an order," "a decision," "a determination," "a finding," or any other designation, has the actual affect of destroying petitioners' existence on the

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[3] *Lehigh Valley Railroad Company* v. *U. S.*, 243 U. S. 412, 61 L. Ed. 819.

[4] *Procter and Gamble Co.* v. *U. S.*, 225 U. S. 282.

West Coast, and has foreclosed them from representing longshore employees in that large area, adversely affecting petitioners future status, and denying and abridging its privileges and prerogatives. The order is not something which the petitioner "can simply ignore." The decision is finally determinative of petitioners' rights in a large geographical district of the United States. Petitioners have no remedy except to appeal to the Circuit Court of Appeals as a person aggrieved by a final order as prescribed under Section 10(f) of the National Labor Relations Act. The possibility of a resort to a District Court for a determination of the present issues, which are ordinarily exclusively determined by circuit courts and which are usually beyond the experience of district courts, is neither an effective, nor an expeditious, nor a final method of disposing of the issues or of protecting petitioners' rights. Certainly the review contemplated by Congress—in a court of appellate jurisdiction in the first instance—should be permitted.

D. The Present Decision Conflicts With the Decision in the Libbey-Owens-Ford Glass Company Case in the Sixth Circuit.

On the 15th day of May, 1939, the Circuit Court of Appeals for the Sixth Circuit, in a case entitled "Libbey-Owens-Ford Glass Company, petitioners, *vs.* National Labor Relations Board, Respondent," entered an order denying respondent's motion to dismiss for lack of jurisdiction and entertaining petitioner's petition on its merits. That case involved a petition for review of the Board's order in a representation proceeding, conducted under Section 9 of the National Labor Relations Act, and of a designation by the Board of an appropriate bargaining unit. In both the *Libbey-Owens-Ford Glass Company* case and the present case petitioners sought review of representation orders, challenging the statutory authority of the Board under the Act to prescribe the unit in

question and seeking review under 10(f) of the Act. The *Libbey-Owens-Ford Glass Company* case presents even less reason for an appeal then the present case for the reason that there an employer rather than a labor union was the petitioner. Nevertheless the Sixth Circuit took jurisdiction to hear the appeal on its merits. Although the court wrote no opinion, the brief of the respondent contained the same points of law argued by the respondent in the present case, and the brief of the petitioner, Libbey-Owens-Ford Glass Company, relied principally on the decision of the court below in the present case and on the decision of this Court in the *Rochester* case. The decree of the Sixth Circuit permitting review of an order entered in a representation proceeding under Section 9 of the Act and certifying one of two competing unions as exclusive bargaining agent for said unit is directly contrary to the decree of the court below in the present case. It is apparent that a conflict in decisions on an identical matter exists between the Circuit Court of Appeals for the Sixth Circuit and the United States Court of Appeals for the District of Columbia—a conflict which can be resolved only by this Honorable Court.

Conclusion.

It is submitted that the decree herein of the United States Court of Appeals for the District of Columbia is in error and should be reversed, and it is respectfully urged that the court grant the writ of certiorari petitioners seek herein.

Respectfully submitted.

JOSEPH A. PADWAY,
HERBERT S. THATCHER,
Counsel for Petitioners.

Dated May 25, 1939.

321 Tower Building,
Washington, D. C.

FILE COPY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

No. 70.

AMERICAN FEDERATION OF LABOR, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, and PACIFIC COAST DISTRICT INTERNATIONAL LONGSHOREMEN'S ASSOCIATION NO. 38,

Petitioners-Appellants,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent-Appellee.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR APPELLANTS.

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BRIEF FOR APPELLANTS.

NATURE OF APPEAL AND GROUNDS FOR JURISDICTION.

This is an appeal from the judgment of the United States Court of Appeals for the District of Columbia entered on February 27, 1939, in the case of American Federation of Labor, International Longshoremen's Association and Pacific Coast District International Longshoremen's

Association, No. 38, petitioners-appellants, v. National Labor Relations Board, respondents-appellants, dismissing a petition filed by appellants herein, seeking to review and set aside an order of the National Labor Relations Board. The decision of the Court may be found in 103 Fed. (2d) 933. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended. The case devolves upon an interpretation of the review provisions of the National Labor Relations Act. Decisions of the various Circuit Courts of Appeal are in disagreement upon such interpretation and upon the question of whether orders similar to the one presently involved are final and appealable. Petition for writ of certiorari was filed with this Court on June 5, 1939, by appellants herein, and an order granting the petition for writ of certiorari was entered October 9, 1939.

STATUTE INVOLVED.

The only statute involved in the present case is the National Labor Relations Act, 49 Stat. 449, 29 U. S. C. A. 151, Sections 9 and 10 thereof, and particularly subsection (f) of Section 10.

STATEMENT OF THE CASE.

This appeal arises from the dismissal of a petition for review filed in the United States Court of Appeals for the District of Columbia under Section 10 (f) of the National Labor Relations Act, in which appellants herein sought to review and set aside an order of the National Labor Rela-

tions Board certifying the International Longshoremen's and Warehousemen's Union, a labor organization affiliated with the Congress for Industrial Organization, as the exclusive bargaining representative for all the longshore employees on the West Coast of the United States.

Appellants are three labor organizations—the Pacific Coast District International Longshoremen's Association No. 38, the International Longshoremen's Association, with which Association No. 38 is affiliated, and the American Federation of Labor, with which both are affiliated. Members of the International Longshoremen's Association are engaged in longshore work on the Pacific Coast and in other portions of the country, and the International Longshoremen's Association had for many years prior to the decision of the Board represented thousands of longshore employees on the Pacific Coast and had set up and maintained many local unions in all of the principal West Coast ports.

A dispute having arisen between the International Longshoremen's and Warehousemen's Union (hereinafter termed the CIO), a rival labor organization, and the appellants herein, concerning representation of longshore employees on the West Coast, the CIO petitioned the Labor Board to certify it as exclusive bargaining agent for all longshore employees on the West Coast. Appellants in their answer denied the Board's power to prescribe a bargaining unit larger than the employees of an individual employer. After lengthy hearings before a trial examiner appointed by the Board at which both labor organizations and the employers were represented and many witnesses examined, the Board, on June 21, 1938, made elaborate findings of fact and conclusions of law, and issued its decision and order of certification (see R. 6-58), certifying the CIO as the **exclusive** bargaining agent of all employees of all longshore employers operating in Pacific Coast ports

from Canada to Mexico.[1] These employers, of which there were some 200, thereupon entered into a collective bargaining contract with the CIO, through an employer association, in which the CIO was recognized as the exclusive bargaining representative of all West Coast longshore employees, and its members given a preferential employment status. (See R. 5.)

A petition objecting and excepting to the decision of the Board and asking for a rehearing filed with the Labor Board by the appellants on August 15, 1938, was denied by the Board on August 27, 1938. (See R. 59 and 61.)

The appellants then sought to appeal to the United

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[1] The Board's Order of Certification, together with the conclusions of law on which it is based, are as follows:

Conclusions of Law.

1. A question affecting commerce has arisen concerning the representation of longshoremen in the Pacific Coast ports of the United States, within the meaning of Section 9 (c) and Section 2 (6) and (7) of the National Labor Relations Act.

2. The workers who do the longshore work in the Pacific Coast ports of the United States for the companies which are members of Waterfront Employers of Seattle, Waterfront Employers of Portland, Waterfront Employers Association of San Francisco, Waterfront Employers Association of Southern California, and Shipowners' Association of the Pacific Coast, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the National Labor Relations Act.

3. International Longshoremen's and Warehousemen's Union, District No. 1, is the exclusive representative of all the workers in such unit for the purposes of collective bargaining, within the meaning of Section 9 (a) of the National Labor Relations Act.

Certification of Representative.

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Section 8, of National Labor Relations Board Rules and Regulations—Series 1, as amended,

It Is Hereby Certified that International Longshoremen's and Warehousemen's Union, District No. 1, has been designated and selected by a majority of the workers who do longshore work in the Pacific Coast ports of the United States for the companies which are members of Waterfront Employers of Seattle, Waterfront Employers of Portland, Waterfront Employers Association of San Francisco, Waterfront Employers Association of Southern California, and Shipowners' Association of the Pacific Coast, as their representative for the purposes of collective bargaining, and that, pursuant to the provisions of Section 9 (a) of the Act, International Longshoremen's and Warehousemen's Union, District No. 1, is the exclusive representative of all such workers for the purposes of collective bargaining, in respect to rates of pay, wages, hours of employment and other conditions of employment.

States Court of Appeals for the District of Columbia under Section 10 (f) of the National Labor Relations Act as a "person aggrieved by a final order of the Board" (see R. 1-5 and 62), solely for the purpose of obtaining a determination from the Court of the power of the Board under the Act to prescribe the coastwide unit.

The petition for review alleged generally that the order of certification was contrary to law in that the Act did not give the Board power to prescribe a unit larger than that composing the employees of an individual employer, and that as a result of the decision and order of certification, petitioners, although selected by a majority of the employees of a large number of individual employers, and functioning as collective bargaining representative for thousands of longshoremen on the West Coast, were nevertheless unlawfully deprived of their status as collective bargaining agents and were unlawfully deprived of their right to represent longshore employees and to engage in business as labor organizations on the entire West Coast of the United States; their membership was being destroyed; their locals were being disrupted; and investments of many thousands of dollars in organizing expenditures, strike and welfare benefits, and maintenance payments made through the years were being lost; and that petitioners were thereby aggrieved by the decision and order of the Board.

The respondent, National Labor Relations Board, denying none of these allegations, thereby assuming the unlawfulness of its action, filed a so-called special appearance objecting to the jurisdiction of the Court of Appeals to hear the appeal and moved to dismiss the petition (R. 64).

Briefs were filed by both parties and the case was argued December 5, 1938. On February 27, 1939, the Court handed down its decision dismissing appellants' petition and holding that the order was not a "final order" within the terms

of the act (see R. 69). In so deciding the Court freely conceded that, with respect to petitioners, the order was "definitive, adversary, binding, final, and in this case struck at the very roots of petitioners' union and destroyed its effectiveness in a large geographical area of the nation." However, the Court felt itself bound to find that the order, not being made in the language of a command, but merely certifying a rival union as exclusive bargaining agent, and hence being in the nature of a "negative order," was not a final order by reason of the decisions of this Court in **Shannahan v. United States**, 303 U. S. 596, and in **Shields v. Utah Idaho Central Railroad Company**, 305 U. S. 117.

Subsequent to the date of that decision this Court in the case of **Rochester Telephone Corporation v. The United States of America and Federal Communications Commission**, 83 L. Ed. (adv. sheets) 719, decided April 17, 1939, re-examined in its entirety the law relating to appealable orders of administrative bodies and rejected the doctrine of "negative orders." Thereupon, on the 20th day of May, 1939, appellants, relying on the Rochester case, applied to the United States Court of Appeals for the District of Columbia for permission to file a petition for rehearing. This petition was denied on the 24th day of May, 1939, for the sole reason that the term of court in which the decision was made having expired April 1, 1939, the Circuit Court was without jurisdiction to entertain a petition for rehearing (see R. 75).

QUESTIONS PRESENTED.

Two questions are involved in this case:

(1) Is an order of the National Labor Relations Board, entered at the conclusion of a representation proceeding under section 9 of the act prescribing an unlawful unit and

unlawfully certifying one of two rival labor organizations as exclusive representative of the employees in such unit, reviewable in the Circuit Courts of Appeal at the instance of the aggrieved labor organization?

(2) Is such an order, entered after lengthy hearings in an adversary proceeding instituted and consummated solely for the purpose of determining the question of the appropriate unit and of certifying a representative, a "final order" within the meaning of section 10 (f) of the act as to the rejected union?

SUMMARY OF ARGUMENT.

I.

Section 10 (f) of the act provides that "any person aggrieved by a final order of the Board, granting or denying in whole or in part the relief sought, may obtain a review of such order" in the various circuit courts of appeal. The broad language of the phrase "any person aggrieved" was employed by Congress designedly to permit relief in all cases where parties to proceedings instituted under the authority of the act were adversely affected by a final order entered at the conclusion of such proceedings. "Any person" does not refer solely to persons involved in unfair labor practice cases, as the Board contends, or Congress would have specifically so provided and would not have employed the broad language set forth in section 10 (f). Congress did not intend to foreclose all rights in a situation where the very existence of a labor organization was threatened by an unlawful act of the Board. An attempt to do so would be subject to constitutional objections; in case of ambiguity the act must be construed in a manner preserving its constitutionality. Section 10 (f) is ame-

nable to the construction that permits appeal in a case similar to the present one, and should be so construed in order to preclude constitutional assault. Thus, the only remaining question is whether the order here involved is a "final order."

II.

The order in the present case fulfills all the legal requirements of a final order of an administrative tribunal, and is appealable as such. The order was entered after a lengthy hearing, instituted to settle a specific dispute in which adverse parties participated. The proceedings were directed solely to the end of determining the question of the appropriate unit and certifying a bargaining representative. No further administrative action is contemplated by the Board—indeed, is not possible—so far as concerns the appellant unions. Appellants' rights have been adversely and grievously affected; their effectiveness has been destroyed throughout the entire West Coast.

The fact that no order was directed expressly against appellant unions, as stressed by the court below, is immaterial. Since the decision of this Court in **Rochester Telephone Corporation v. United States** superficial distinctions must yield to substantive realities. The criteria, grounded on reason and policy, established in the **Rochester case**, requiring that primary jurisdiction remain in the Board, that administrative finality be given its factual findings, and proscribing appeals from preliminary or non-final orders, are all met in the present case. Here the review sought calls for no technical knowledge pertaining to labor relations. It involves only a question of statutory authority, which is properly within the exclusive province of a court.

ARGUMENT.

The American Federation of Labor is seriously disturbed over the tremendous implications of this case. The employees of hundreds of employers have been thrown together into one unit, many against their voiced desires. Thousands of these employees are members of the American Federation of Labor. Separated and grouped in individual employer units, these employees have by large majorities, and sometimes by 100 per cent unanimity, selected the American Federation of Labor as their bargaining agent. But the Board's order has deprived them of their right to bargain through the American Federation of Labor. What accentuates the tragedy is that it does violence to the fundamental principles of the National Labor Relations Act. The Act guarantees the right to "bargain collectively through representatives of their **own choosing**" (Section 7). The Act is founded on the fundamental proposition that the employees' choice of representation shall be absolutely free from employer influence. But this decision of the Board flouts this principle by granting to the employer control over the selection of the employees' representation. To illustrate:

Assume three employers, "A," "B," and "C"; each employing 1,000 workers; "A" votes 750 for the C. I. O. and 250 for the A. F. L.; "B" votes 800 for the C. I. O. and 200 for the A. F. L.; "C" votes 1,000 for the A. F. L. Under the Board's decision the C. I. O. becomes the bargaining agent for the thousand A. F. L. employees of "C." This is accomplished by "A," "B" and "C" associating in an employer organization. If "C" refuses to combine with "A" and "B," his 1,000 employees, having selected the A. F. L. as their representative, will be represented by the A. F. L. By the same token, if "C" was in association with "A" and "B," and desired to keep the C. I. O. from his plant, he could simply withdraw from the combination.

In other words, control over the employees' choice is vested in the employer by either entering into or withdrawing from an association.

The same kind of example will illustrate how employer "C," by combining with "A" and "B," can dictate who shall bargain for the employees of "A" and "B." If 700 of A's employees want the C. I. O. and 300 the A. F. of L., and 700 of B's employees want the C. I. O. and 300 the A. F. of L., "C," by associating with "A" and "B," compels the employees of "A" and "B" to be represented by the A. F. of L. The Act never intended to vest such control in an employer or such deprivation of fundamental rights of employees. The Act may vest some discretion in the Board in respect to unit, but it does not intend to permit discretion to run riot.

Chairman Madden, in a public address delivered September 6, 1937, has succinctly expressed the foregoing thoughts:

> "But the choice does not lie with the employer, **nor the Board**; the choice lies with the men themselves, and the Board's duty is to protect them in their choice."

Moreover, the foregoing does not indicate all the inherent dangers of this decision of the Board. It was never contemplated that all of the employees in a given industry throughout the United States shall, against the desires of employees of individual employers, be bargained for by one representative as a result of a combination of the employers into an association. It is nowhere disclosed that Congress intended such vast economic and social consequences.

Just as the employers on the West Coast have formed an association, so may the employers of longshoremen of the Gulf of Mexico and of the Atlantic Coast form an

association. These employers may in turn join with the West Coast employers in a single association or chamber of commerce, which shall, among other things, undertake bargaining. Thus the employees of thousands of employers all over the United States, living in different geographical areas and desiring to be bargained for by representatives who are close to them (in all probability, officers of their local unions), who understand the problems peculiar to their localities, are denied the right of bargaining through such representatives. It would be possible for the employers in the Cities of San Francisco and New York to control the labor relations of the entire longshore industry in the United States, with no right on the part of the employees of thousands of employers in other parts of the country to do anything about the matter, unless they wish to resort to strike. The control thus vested in the employers through their association and the larger groups of employees of a few employers would make it possible to enter into closed-shop contracts and thereby procure the discharge of thousands of workers throughout the country and replacement of such workers by members affiliated with the dominant group. If Congress intended so radical a transformation of the economics of the country, it would have said so in clear and explicit terms, and even then there would remain a serious constitutional question.

Industry-wide bargaining should be on a voluntary basis by consent of the majority of the employees of each employer, and not by administrative fiat. If, by the doctrine pronounced by the Board, employers are free to combine or not to combine, it would certainly follow that the Labor Relations Act grants to employees the same freedom in matters so vital to employees.

It should not be made possible by administrative fiat to obliterate existing labor organizations desired and selected by the employees of individual employers. Years of organ-

izational efforts on the part of local unions are aborted by this decision against the express wishes of the majority of employees of individual employers.

Desirability and feasibility of industry-wide bargaining is dependent on the unanimity and consent of the separate groups of employees. Such unanimity is absent in a rival union situation. The Board, therefore, errs in predicating its decision upon the fact of previous industry-wide bargaining when no rival union situation existed, and when the law did not guarantee freedom of choice.

Yet, in the present case, the Board contends that we are to be denied the right to appeal to a court of law for a determination of this vital fundamental issue.

I.

INTRODUCTORY STATEMENT.

Preliminarily this appeal brings before the Court a problem in statutory construction, involving a question of constitutional necessity for judicial review of an administrative decision. The court below has passed upon this preliminary question in appellants' favor, and held that there is nothing in the act which denies appellants a standing "as a person aggrieved by a final order" of the Board. The lower court held, however, that the order was not a "final" one, reluctantly predicating this holding upon its view of the "test" established in the **Shannahan** and **Shields** cases,[2] that an order to be final must be made in the language of a command and must direct a particular thing to be done. Accordingly the principal problem involved in this case is the "finality" necessary for a judicial review of administrative orders—a problem recently re-examined at length by this Court in **Rochester Telephone Corpora-**

2 Shannahan v. United States, 303 U. S. 596; Shields v. Utah Idaho Central Railroad Co., 305 U. S. 117.

tion v. United States, 83 L. Ed. 719. The Rochester case, by clarifying the Shannahan and Shields cases, substantially limits the applicability of those cases. The law no longer exacts such artificial prerequisites to the existence of an appealable order relied on by the court below.

A full appreciation of the significance of the position taken by the administrative tribunal here involved is important to an ultimate determination of this case. Appellants here seek merely a determination of a pure question of law not affecting administrative expertness or finality. The Labor Board, although suggesting no policy considerations and in no way minimizing the dire predicament in which appellants are placed by its action, coldly argues that no court exists to which appellants can turn for a determination as to whether the Board has exceeded its authority under the act; that appellants must suffer without hope of relief their destruction in a large and important area of the United States by administrative fiat. The Board resorts to technical refinements of the language of the National Labor Relations Act in support of its position. For an administrative body to take such a stand unfortunately gives substance to the early criticism directed against the increasing power of administrative tribunals as a dangerous innovation.[3] It is not our purpose to criticize in any manner whatsoever the prevalent and growing use of administrative tribunals to regulate and govern the affairs of a complex industrial society. It is our purpose to seek preservation in this system of administrative government the fundamental ideals and principles of justice that the years have enshrined in the jurisprudence and procedure of our customary courts, ideals which have heretofore made the administrative system compatible with a democratic society. For the Labor

[3] See Sutherland, Private Rights and Governmental Control (1918), 85 Cent. L. J. 168; Allen, Bureaucracy Triumphant; The Rt. Hon. Lord Hewart of Bury, The New Despotism; Kidd, Encroachment of Administrative Bodies on the Judicial Sphere (1920), 45 Scot. L. Rev. 325.

Board thus to seek insulation from court inquiry into determinations of such importance and consequence as those involved here is to attempt arrogation unto itself of autocratic powers in dangerous disregard of all concepts of the function of the judiciary in our present form of government. The Board has nowhere so much as suggested a remedy that may be available to appellants; on the contrary, it has strenuously resisted every effort to obtain a judicial hearing as to a purely legal question.

Let us inquire into the Board's arguments.

II.

SEC. 10 (f) PERMITS REVIEW OF FINAL ORDERS ENTERED IN REPRESENTATION PROCEEDINGS UNDER SEC. 9.

A. Board's Argument.

At the outset we are met by the contention on the part of the Board that determinations in representation proceedings instituted under Section 9 of the National Labor Relations Act are immunized against judicial review because the Act provides only for appeal from orders in unfair labor practice cases, and, therefore, inferentially denies appeal in all other matters. This argument, based on a technical construction of section 10, can assume the "finality" of the order in question. The Board's argument runs somewhat as follows:

The provision for review by "any person aggrieved by a final order of the Board, granting or denying in whole or in part the relief sought" appears in section 10 of the Act; because such section is entitled "Prevention of Unfair Labor Practices" and because such section deals mainly with proceedings to prevent unfair labor practices the provision for review must, therefore, relate only to unfair

labor practice cases.[4] This must be true, says the Board, because section 9 (dealing with the selection of representatives), under which the present proceedings were instituted, contains no provision for review.[4a]

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[4] Section 10 (f), N. L. R. A., reads:

"Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing the Court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board, and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive."

[4a] Sec. 9. Representatives and elections.

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

The Board argues that, since the use of the word "person" in subsections a, b, c, d and e of section 10 relates to the employer as the "person" committing the unfair labor practice, that it likewise refers to such "person" in section 10 (f). Accordingly it contended in its brief below that "the words 'such person' are always used to mean a person alleged to have engaged in unfair labor practices, as an analysis of Section 10 as a whole demonstrates." But the Board proves too much, for it has proved that the employer, who is the only one who can commit an unfair labor practice, alone can have a right of appeal in any case, and the aggrieved labor organization would have no recourse whatsoever. Therefore, such appeals as have been taken by the unions to the circuit courts and to the Supreme Court of the United States, as in the Consolidated Edison Company case,[5] in unfair labor practice cases are unauthorized and have no standing. This, of course, is not the law or the fact, and the Board would not so contend. But the point serves to refute the Board's argument that merely because the word "person" is used in the first five subsections of section 10 as referring only to an employer, that it must therefore refer only to an employer in section 10 (f).

B. Language of Section 10 (f) Is Extremely Broad, and Designedly So.

The Board's argument entirely disregards the extremely broad language used by Congress in section 10 (f). "Any person aggrieved" is an exceedingly broad phrase. It can include a variety of individuals. Surely Congress used the term "any" designedly. The word "person" includes a labor organization. [The definition in section 2 (1) of the Act states that "The term person includes one or more individuals, partnerships, associations, corpora-

[5] Consolidated Edison Co. of N. Y., Inc., v. N. L. R. B., 59 S. Ct. 206.

tions."] "Aggrieved" is a term having a well-understood meaning in the law, and obviously would include persons whose property rights have been violated or disturbed. "Final order" is such order of an administrative body as is recognized by the courts as reviewable. A discussion of this phrase is set forth in a later portion of this brief. The language "granting or denying, in whole or in part, the relief sought" is likewise extremely broad; no attempt is made to clarify as to the type of relief intended.

The Board argues that because it is later stated in the same sentence dealing with final orders that reviews shall be obtained in the Circuit Court "wherein the unfair labor practice in question was alleged to have been engaged in," Congress intended review only in unfair practice cases. The Board forgets that an alternative jurisdiction for review is likewise set forth in that sentence, which is in the "circuit wherein such person resides or transacts business," and a third alternative—"in the Court of Appeals for the District of Columbia"—is also provided for. If by the term "relief sought" it was intended merely to give the right to appeal in unfair labor practice cases, Congress could quite specifically have so stated by using definite language, such as "by the relief sought in unfair labor practice cases," or some similar language. This it did not do, but, instead, significantly refused to qualify the term.

C. Two Complete Proceedings Providing for Distinct Types of Relief Are Set Forth in Act. Congress Did Not Intend to Permit Review of Final Orders in One and Not the Other.

The National Labor Relations Act provides for two distinct types of relief for labor organizations. The first, set forth generally in sections 7, 8 and 10, relates to relief from certain unfair labor practices of employers. The second, arising under sections 8 and 9, gives relief from disputes

as to whether a majority exists in a claimed unit and from competitive bargaining through minorities and company unions, giving the right to labor to invoke the aid of the Board in determining whether it represents a majority or whether the unit that it wishes to represent is appropriate for bargaining purposes.

In this second type of case, which is the one here involved, an actual proceeding, including the taking of testimony and the making of a decision is provided for. Congress declares that "the Board shall **decide**" the appropriate unit and "**shall provide for an appropriate hearing upon due notice.**" The language of the section points to definitive action. The Board is not only authorized, but is directed to provide a hearing upon notice to determine the controversial question of an appropriate unit, and to certify the majority representative. An entire and complete proceeding is contemplated, which is of an entirely different nature from that prescribed in the section relating to unfair labor practices. Section 9 (a) confers on labor organizations a substantive right, that of exclusive representation, which accrues to a particular union, if the union can show it is in the majority in an appropriate unit. A majority is necessarily affected by the size, shape and type of unit designated by the Board as appropriate. The Board's decision to designate one of two units presented to it by two unions as appropriate, decides substantive rights, as can be readily seen by the present case. The Board's decisions can and will vitally affect the very life of labor organizations. It is not to be contemplated that Congress would prohibit appeals from such decisions.

In this connection the remarks of Circuit Judge Hicks in **International Brotherhood of Electrical Workers v. N. L. R. B.**, 105 Fed. (2d) 598, are relevant.

> "• • • It is this 'Second Direction of Election' which petitioners seek to have reviewed and set aside.

We are not concerned here with unfair labor practices as between employer and employee, set out in Sec. 10 of the Act, 29 U. S. C. A., par. 160. We are dealing with the procedure for the designation of representatives of employees for purposes of collective bargaining, described in Sec. 9, a concededly different matter. It is the policy of the United States, set forth in the third paragraph of Sec. 1 of the Act, 29 U. S. C. A., par. 151, to encourage the practice and procedure of collective bargaining and to protect the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment, or other mutual aid or protection. In National Labor Board v. Pennsylvania Greyhound Lines, 303 U. S. 261, at page 265, 58 S. Ct. 571, 574, 82 L. Ed. 831, 115 A. L. R. 307, the court said:

" 'The history of the Act and its language show that its ruling purpose was to protect interstate commerce by securing to employees the rights established by section 7, 29 U. S. C. A., par. 157, to organize, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for that and other purposes. National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 23, 33, 57 S. Ct. 615, 617, 81 L. Ed. 893, 108 A. L. R. 1352. This appears both from the formal declaration of policy in par. 1 of the Act, National Labor Relations Board v. Jones & Laughlin Steel Corp., supra, 301 U. S. 1, at pages 22-24, 57 S. Ct. 615, 617, 91 L. Ed. 893, 108 A. L. R. 1352, and from section 7, in itself a declaration of the policy which, in conjunction with section 10 (c) [29 U. S. C. A., par. 160 (c)], it adopts as the controlling guide to administrative action.'

"Section 7 of the Act guarantees to employees the right to bargain collectively through representatives of their own choosing and to engage in concerted activities, for the purposes of collective bargaining or other mutual aid or protection. Associated Press v. Labor Board, 301 U. S. 103, 123, 57 S. Ct. 650, 81 L. Ed. 953; National Labor Board v. Jones & Laughlin Steel

Corp., 301 U. S. 1, 33, 57 S. Ct. 615, 81 L. Ed. 893, 108 A. L. R. 1352. It was said in the Jones & Laughlin case that this is a fundamental right. See, also, Texas & N. O. R. Co. v. Brotherhood of Railway & S. S. Clerks, 281 U. S. 548, 571, 50 S. Ct. 427, 74 L. ed. 1034.

"Having made the guaranty, it was necessary that the Congress should adopt a procedure for the selection of such representatives. To this end Sec. 9 (a) provides that representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining, etc. There is thus provided the simple American principle of majority rule. Virginian Ry. Co. v. System Federation No. 40 etc., 4 Cir., 84 F. (2d) 641, 652."

The Board does not attempt to explain why Congress should permit review in unfair labor practice cases and deny it in representation proceedings where issues of even more vital consequence to labor unions may be decided. The Board refers to certain Congressional Reports (H. R. No. 1147 and S. R. No. 573, 74th Congress) as authority for its position that it was the intention of Congress to bar relief in the type of situation before the Court. A careful reading of these reports discloses quite conclusively that it was the aim of Congress merely to avoid disturbance of the Board's orders or proceedings prior to a final determination, and that Congress was particularly concerned only with the denial of Court review **"prior to the holding of an election."** The Court's attention is directed to H. R. 1147, 74th Congress, pages 22-23, and S. R. No. 573, 74th Congress, page 5 et seq., wherein the congressional committees recited the unfortunate experience under Public Resolution No. 44, whereby the administrative machinery of the old Labor Board was

stalled by the extensive resort to courts by employers before the Board could take action.

The present case does not involve an attempt to impede a tribunal from concluding a proceeding and does not occur in an intermediate stage of a proceeding.

D. A Determination of an Appropriate Unit Is Not a Mere Finding of Fact. It Is a Conclusive Decision of a Substantive Question, Adjudicating Property Rights.

The manifest difference in the legal effect of the holding of an election and the decision of a unit by the Board precludes a convenient assimilation of one to the other as being a mere "determination of fact," as contended by the Board. The Board, in cases involving a determination of a unit, has prescribed various factors which must be taken into consideration in deciding the "appropriateness" of a particular unit. (See Third Annual Report N. L. R. B., pages 156 through 197.) Thus, the history of self-organization between the particular employees and the employer, eligibility of membership in local organizations, the mutuality of interest of employees, including the nature of the work involved, the skill involved, the wages paid, the functional coherence among employees in the unit under consideration—are all considered relevant in deciding what unit is or is not appropriate for the purpose of bargaining. No such exercise of discretion or determination of policy is involved in the conduct of an election. If, as argued by the Board, the determination of a unit is the mere certification of a fact, would it not be possible for any lay group to decide an appropriate unit? Obviously, only a board of experts trained in labor relations could make the judicial determination of what unit can be considered "appropriate." The Congressional Reports re-

lied on by the Board speak only of denying relief from a factual determination, not a judicial determination.

What is obvious from the Congressional Reports is that Congress fully intended to provide against arbitrary action of any sort by the Board, and fully intended to provide a complete review to any "aggrieved" party. In House Report No. 1147, p. 24, it is stated, in speaking of Section 10 (f):

> "According to a similar procedure, any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may claim a review of such order in the appropriate circuit court of appeals, or in the Court of Appeals of the District of Columbia. **It is intended here to give the party aggrieved a full, expeditious, and exclusive method of review in one proceeding after an order is made.** Until such final order is made the party is not injured, and cannot be heard to complain, as has been held in cases under the Federal Trade Commission Act."

The Board refers to subdivision (d) of section 9 as indicating an absence of review, because it provides that where proceedings under section 9 are made part of proceedings under section 10, as is sometimes the case, review can be had in the proceeding under section 10. This section was primarily designed to provide protection for the employer. The **employer** in the present case was and is protected against such possible arbitrary action by section 9 (d). If he desires a review of a representation determination he need only refuse to bargain with the agency certified by the Board and thus bring into operation in a proceeding brought against him for unfair practices under section 10 the provisions of section 9 (d) dealing with the judicial review of such determinations. In the unlikely event that the certified agency chooses not to file charges,

then the certification does not harm the employer. Thus, the employer is fully protected.

Not so with appellants herein. A labor organization is necessarily injured by the unlawful certification of a rival union. **It has no further recourse before the Board.** Congress did not, we submit, intend to limit its protection against arbitrary decisions of the Board in representation cases to employers. The Board must concede that the only way a labor organization which has been adversely affected by a decision of the Board under section 9 can take advantage of section 9 (d) is to induce the employer to reject the Board's decision, subject himself to an unfair labor practice proceeding, have the Board make an order against him, find him guilty of unfair labor practices, secure a court review, and then, and then only, can the union intervene in the employer's petition for review. The suggestion that this might be done would come illy from the mouth of the Board. Further, appellants have no control over the employer, and if the employer elects to comply with the law there is no recourse by way of even a roundabout unfair-practice procedure. In the present case the employers involved have not only complied with the order of certification, but have entered into collective bargaining contracts with the rival union, recognizing it as exclusive representative and giving it preferential employee status.

It has been suggested that the aggrieved labor union could, in spite of the certification, insist that the employer treat it as the exclusive bargaining agent in the unit it considers appropriate; that upon refusal of the employer to so bargain the union could then file charges of unfair labor practices in the hope that the Board will issue a complaint and thereby obtain a review by the Circuit Court of Appeals on the question of the unit. This suggestion overlooks the fact that the Board has complete dis-

cretion over the issuance of a complaint. Surely, it will not seriously be contended that the Board will issue a complaint on charges filed because an employer has refused to bargain with union "A" after the Board has certified union "B" as the proper bargaining agency.

E. The Board's Contention That the Act Does Not Permit Review of the Present Order Endangers the Constitutionality of the Act. The Act Must Be Construed in a Manner Preserving Its Constitutionality.

It is submitted that the Board's contention that the absence of a specific, unmistakable provision for review in the Act is sufficient to deprive appellants of such right of review, and that Congress intended it so, is not only erroneous but is extremely ill-advised, for such contention unnecessarily exposes the National Labor Relations Act to successful constitutional attack. The Board has before attempted such unnecessary exposure. A similar argument was made by the Board in the Consolidated Edison Company case, supra. The Act does not by explicit provision require unions whose interests were affected to be made parties to an unfair labor practice proceeding. Specific provision for making parties defendant to the Labor Board's suit related only to employers who were committing unfair labor practices. The Board contended before this Court that, because Congress had remained silent on the question of the necessity of joining unions, Congress had indicated that it did not wish these unions to be parties to the proceedings. The Court rejected the argument and, in holding that provision for intervention was impliedly contained in the Act, stated:

> "The Board urges that the National Labor Relations Act does not contain any provision requiring these unions to be made parties; that Section 10 (b)

authorizes the Board to serve a complaint only upon persons charged with unfair labor practices, and that only employers can be so charged. In that view, the question would at once arise whether the Act could be construed as authorizing the Board to invalidate the contracts of independent labor unions not before it; and also as to the validity of the Act so construed."

In the present case, however, specific provisions permitting review are present, and the clause "any person aggrieved by a final order" is sufficiently explicit to include the appellants. If it is deemed that ambiguity does exist, it is submitted that the usual rule of statutory construction should be applied, and the construction preserving the constitutionality of the legislation should be adopted.

The importance of this phase of our argument requires a digression into the question of whether constitutional requirements compel judicial review of the Board's decision in this case.

The present case involves an exercise by the Board of powers essentially judicial in nature, under which property rights are adversely determined. A regard for due process and separation of powers concepts requires a judicial review. The present case involves a settlement of disputes between individual contestants, which is the very *raison d'etre* and the primary occupation of the courts of law. If it is the essence of the judicial body to decide, certainly a determination of the appropriateness of a unit for collective bargaining purposes, involving a consideration of all of the factors implicit in such a determination, hereinbefore mentioned, is an exercise of the judicial function. When the real controversial nature of the proceeding before the Board is considered, there can remain no doubt as to the judicial nature of the Board's proceeding.

The Board's determination had an adverse effect on the property interests that were litigated in the proceedings.

Whereas in this case one of the contesting unions failed to obtain certification, that union in effect is "put out of business." There is no practical advantage to any working man to affiliate himself with a union that has not the legal right to represent him. The first purpose of any labor organization, its main business, is growth through the acquisition of members. Frequently two rival organizations, specifically the A. F. of L. and C. I. O., engage in a frank, open contest to enlist employees of a given industry or plant in their respective organizations. A decision by the Board certifying one of the two decides that contest. To hold with the Board, to say that such a decision, no matter how arbitrary, no matter how erroneous in law, cannot be appealed from, is to deprive the labor organization which fails to obtain the certification of property without due process of law.

That property rights are involved in the Board's adjudication cannot be denied. This Court, in the case of **Texas & New Orleans Railroad Co. v. Railway Clerks**, 281 U. S. 548 (an injunction suit brought by a labor organization), said that:

> "* * * if it could be said that it was necessary to the present instance to show a property interest in the employees in order to justify the court in granting an injunction, we are of the opinion that there was such an interest, with respect to the selection of representatives to confer with the employer in relation to contracts of service, as satisfied the requirement."

Furthermore, the analogy of the present case to those cases protesting against interfering with advantageous relations, such as **Truax v. Raich**, 239 U. S. 33, and **Pierce v. Society of Sisters**, 268 U. S. 510, likewise indicate the necessary property right. The undenied allegations in the petition respecting the loss of appellants' status as collective bargaining agents, and of the right to engage in

business as a labor organization on the West Coast of the United States, the disruption of membership, the loss of investment of many thousands of dollars in organization expenditures, strike and welfare benefits, and maintenance payments made through the years, more than demonstrate essential property rights.

Since, as seen from the foregoing discussion, the determination by the Board involves primarily a settlement of a controversy between private individuals affecting and involving private property rights, as distinguished from administrative determinations of matters of primary public concern, or matters in which the state has a direct interest where the individual is merely incidentally affected, or matters of governmental privilege or license,[6] it becomes an essential requirement of due process that a court of law ultimately pass upon such determination, at least so far as the settlement of the controversy does not involve expert knowledge of experienced administrators, and involves merely an application of ordinary rules of law. See **Great Northern Ry. Co. v. Merchants Elevator Co.**, 259 U. S. 285; **Ohio Valley Water Company v. Ben Avon Boro**, 253 U. S. 287; **Cowell v. Benson**, 285 U. S. 22; **St. Joseph Stockyards Company v. U. S.**, 298 U. S. 38, 8 L. Ed. 1033.

Another, and perhaps more proper, constitutional deterrent to any attempt to prevent judicial review of final determination of private property interests, by administrative bodies, at least so far as questions of law are concerned, is that such an attempt would constitute an unconstitutional delegation of judicial power. See **Borgnis v. Falk**, 147 Wis. 327, 133 N. W. 209; **Oregon R. & N. Co. v. Campbell**, 173 Fed. 957.

As stated by the Chief Justice in the St. Joseph Stockyards case, supra:

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[6] Prof. Ray A. Brown, "Administrative Commissions and the Judicial Power," 19 Minnesota Law Review 261, at 275, et seq.

"* * * The legislature cannot preclude that scrutiny of determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation. Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. It is said that we can retain judicial authority to examine the weight of evidence when the question concerns the right of personal liberty. But if this be so, it is not because we are privileged to perform our judicial duty in that case and for reasons of convenience to disregard it in others. The principle applies when rights either of person or of property are protected by constitutional restrictions. Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority."

Justice Brandeis' concurring opinion in the above case, while emphasizing the desirability of permitting an expert

body to make conclusive determination of technical matters, emphasizes that:

> "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality. * * *"

Since the construction contended for by the Board clearly subjects the Act to constitutional objections, it is submitted that the Court, if it believes any ambiguity does exist, should resolve that ambiguity in favor of a construction which should save the Act from constitutional attack.

The foregoing argument is not, of course, an attempt to prove the Act unconstitutional. Nor are we urging that the circuit courts can assume jurisdiction because Congress has failed to provide an appeal. We recognize that no court can acquire jurisdiction by that route. On the contrary, our argument is premised on the fact of an express Congressional grant of jurisdiction under Section 10 (f) of the Act. It is our position that in so far as section 10 (f) may be somewhat ambiguous this Court should adopt that rule of construction which is compatible with the constitutionality of the Act.

F. Applicable Decisions of the Circuit Courts.

The question of whether Section 10 of the Act permits review on orders entered in proceedings under section 9 has been before several of the circuit courts.

The Board made all of the arguments previously discussed before the court below, and its contentions in this respect were rejected in a unanimous opinion. Chief Justice Groner stated in this respect as follows:

"* * * The question in the case is whether the decision appealed from is a 'final order' within the terms of the Act. As a preliminary question, the Board argues that petitioner is without any standing to appeal regardless of whether the order is final or not, but we think the language of Section 10 (f) of the Act sufficiently answers this contention. It authorizes a review at the instance of 'any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought.' The right under this section has already been invoked without question by labor unions in a number of cases, and if the Act should be held to confine the right of review to an employer and to deny it to a representative of the employees, it would create an anomalous situation. We think the fair intendment of the language as well as the purpose of Congress was to provide a judicial review to any aggrieved party where the order is final, without narrowing it in the manner now contended for by the Board. In this view we have a case in which the right, called by the Supreme Court in Texas & New Orleans Railroad Co. v. Brotherhood of Ry. & S. S. Clerks, 281 U. S. 548, 571, a property right, is charged to have been wholly destroyed by the action of the Board."

The question was likewise before the Circuit Court of Appeals for the Sixth Circuit in the case of **International Brotherhood of Electrical Workers v. N. L. R. B.**, 105 Fed. (2d) 598 (decided June 28, 1939). That case involved an appeal by a labor organization under section 10 (f) to review a decision of the Board made in proceedings under section 9. The Board objected to the jurisdiction of the Court, making the same arguments here made. The Court, deciding in favor of the labor organization, stated as follows:

"* * * Respondent urges that the Act makes no provision for judicial review in the instant case; that

petitioners' right of review is by Sect. 9 (d) to be held in abeyance until a final order in an unfair labor practice controversy, Sec. 10 (a), which in some degree or manner involves petitioners' complaint, comes up for review. But there is no controversy here over labor practices as between the Company and its employees. Indeed, it is not shown that any such controversy exists. It may never arise, or, if it should, it may never be presented here.

"In this situation does this court have jurisdiction to review the order complained of, which, as we have pointed out, destroys the right of petitioners, guaranteed by Sec. 7 of the Act, in the exercise of full freedom to bargain collectively with the Company through representatives of their own choosing? We think it does. We cannot think that the Congress overlooked this important matter. The right of employees to choose their own representatives for collective bargaining was generally recognized and conceded long before it was guaranteed by the National Labor Relations Act, 29 U. S. C. A., Sec. 151 et seq. See the discussion in National Labor Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, at page 33, 57 S. Ct. 615, 81 L. Ed. 893, 108 A. L. R. 1352. This essential property right was not only guaranteed, but was safeguarded, otherwise the Act itself would be subject to serious inquiry as to whether it violates the due process clause of the Fifth Amendment, U. S. C. A. Const.

"Section 10 (f) provides:

" 'Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business * * * by filing in such court a written petition praying that the order of the Board be modified or set aside.'

"Petitioners are 'persons' as defined in Section 2 (1)

of the Act, 29 U. S. C. A., Sec. 152 (1). They reside and transact business in this circuit. For the reasons above indicated they are justly aggrieved by the order of the Board complained of, which denied to them their rights under Sections 7 and 9 of the Act, 29 U. S. C. A., Secs. 157, 159.

"Respondents insist that the order is not final, but it was final not only in its effect but in that it was the last order to be made under the procedure set out in the Act for the determination of representatives of employees for the purposes of collective bargaining with the Company. It is true that if the election had been held it was the duty of the Board to certify the result, but a certificate is not an order.

"Finally, it is said that the phrase 'wherein the unfair labor practice in question was alleged to have been engaged in,' found in Sec. 10 (f), limits the right of judicial review of procedure involving unfair labor practices only, as described in Sec. 10 of the Act. It certainly permits a review of the procedure in such character of controversy, but does not confine it thereto.

"The Supreme Court did not so limit it in Consolidated Edison Co. v. Labor Board, 305 U. S. 197, 226, 59 S. Ct. 206, 83 L. Ed. .... See also the discussion touching jurisdiction under Sec. 10 (f) found in In re National Labor Board, 304 U. S. 486, 493, 58 S. Ct. 1001, 82 L. Ed. 1482, and in Ford Motor Company v. National Labor Board, 305 U. S. 364, 369, 59 S. Ct. 301, 83 L. Ed. ...."

The Board relies on the case of **Wallach's, Inc., v. Boland et al.**, 2 N. Y. S. (2d) 179, which involved an appeal by an **employer** from certification under Section 705 of the New York Labor Laws. The sole issue (by stipulation) was whether the Board's decision was reviewable. Section 707 (4) of the act provides for review of unfair labor practice cases to parties aggrieved. The **employer** having appealed, it was held he, the **employer**, was not an aggrieved

party. As to him the certification was not a final order. Two of the five judges dissented. Significant, however, is the following statement of the Court:

> "A different question might be presented if the determination involved only a **dispute between employees** concerning the right to represent their fellows, **wherein no further proceedings under Section 706** (unfair practices) would be taken."

The New York Act is similar to the Federal Act.

The Board relies principally on the case of **United Employees Association v. National Labor Relations Board**, 96 Fed. (2d) 875, decided by the Third Circuit March 18, 1938. That case on its facts is analogous to the present one. It is submitted, however, that the reasoning of the Court therein is erroneous. The opinion states that the final certification of a rival union is a fact "which can be entirely ignored and disregarded" by a labor organization. The Court does not explain in what effective manner the aggrieved labor organization "can entirely ignore" the designation of a rival and still continue in existence.

The Court further states that:

> "* * * If and when the Board by a final order directs the petitioner in this case to cease and desist from any of its practices or to do anything the petitioner may obtain a review of that order by this court, which may then examine the regularity of the proceedings by which the Board found that the union was the exclusive representative of the Association for the purposes of collective bargaining, but until then both the Association and the Company may proceed just as though no election had been held or certification made. Until then neither the Association nor the Company are hurt."

Why the Association, which was a labor organization,

is not hurt is not explained by the Court. Further, in the above quoted passage, the Court speaks of a final order that might be entered directing the petitioner therein (which was the employee representative or association) to cease and desist from doing anything, and that then the petitioner may obtain a review. The Court is clearly in error in so stating, for there is no power in the Board to issue cease and desist orders against unions or employee representatives, except perhaps in so far as they are company unions, and even then the order is directed against the company. It would seem that the decision of the Third Circuit has too insubstantial a basis in logic or reasoning to serve as persuasive authority in the instant case.

III.

THE PRESENT ORDER CONTAINS ALL THE ELEMENTS OF "FINALITY" ENTITLING APPELLANTS TO JUDICIAL REVIEW.

A. The Meaning of Final Order.

We come now to the question of whether the Board's decision of an appropriate unit and the order of certification based thereon constitutes a "final order" within the meaning of the term as used in section 10 (f). Congress, as is usual in providing for court review of administrative action, specified that only those orders which were "final" —that is, definitive, and entered at the conclusion of an adversary proceeding—were appealable. The purpose of such provision is, of course, threefold—to protect the Board against harassment, persons seeking relief under the act against delay, and the courts against an inundation of litigation instituted during interim stages of a proceeding. Further, and quite properly, the courts have protected the comparatively new process of administrative

government by the promulgation of a series of "tests." On examination these "tests" are almost all found to have an ultimate basis in two fundamental doctrines of policy. These doctrines were stated by this Court in its recent decision in the Rochester case to be: (1) "the primary jurisdiction doctrine," which requires that matters calling for technical knowledge should be first adjudicated by the expert administrative body, and (2) "the doctrine of administrative finality," which requires that the range of issues upon review must be narrowed to questions affecting constitutional power, statutory authority and basic prerequisites of proof. Back of all the tests and doctrines is the fundamental of a judicial regard for the special functions of administrative agencies and a desire to permit their practical operation in the manner intended by Congress.

Prior to the Rochester decision the courts, in their earnest attempt to preserve a practical workability in administrative procedure, laid down certain more or less formulistic criteria.

Frequently these criteria were short-cut techniques of expressing the basic considerations underlying the Court's decision. In too many instances, however, the courts relied exclusively on these devices and overlooked the fundamental policies and rationale for granting or denying review in any given case.

The Court often seized upon particular circumstances peculiar to the case before it and generalized such circumstances into a rule or test. Examples of such tests or rules are the necessity that an order be "affirmative"; that it effect a change in a status quo; that it be couched in the language of a command; that it be enforceable by the tribunal making the order and no other; that it require a particular thing to be done.

In quite recent years a ritualistic conformance with

these formulae has given rise to the denial of review under circumstances where the Court felt compelled to permit review by way of a "bill in equity." See **Shields v. Utah Idaho Central Railroad Co.**, 305 U. S. 117, and **Utah Fuel Company v. National Bituminous Coal Company**, decided January 30, 1939. It is possible that the consequence of permitting review in such manner, and at the same time clinging to the legalistic "tests," may be found more disastrous than a laxness in permitting review under the terms of the administrative statute in question; for the extent of review is almost as great, and the petitioner must resort to a court other than that intended by Congress to be the reviewing court. Not only is an additional appellate step necessary, but also matters which the circuit courts can more properly determine because of their greater experience, will be entrusted to the district courts.[7]

The necessity imposed on the court below to follow religiously the formulae prescribed by this Court in cases prior to the Rochester decision is responsible for the decision in the present case. The lower court not only decided the case against its own better judgment, but even contrary to a formula that it had previously worked out for its guidance. The dangers, as well as the absurdities, involved in a rigid doctrinal application of any set pattern of rules is concretely illustrated by the decision.

The following portions of the opinion are quoted both in the above connection and, more important, as full support of our contention that the present order is in effect and substance a final definitive order. We could frame no better statement of our position than that made by Chief Justice Groner in the following portion of his decision:

> "• • • Enough has been said to show that we have here a controversy between two national labor

7 See 48 Harv. L. Rev. 1257.

organizations, both of which have appealed to the Board to resolve their conflicting rights and the rights of their members, and one of which claims that the unlawful action of the Board in the designation of an employer unit beyond the terms of the Act has destroyed its property rights and the property rights of its members and that, unless it can obtain a review by appeal to this Court or some other Circuit Court of Appeals, it will be wholly without redress of any kind.

* * * * * * *

"The Supreme Court has held in a number of cases that mere preliminary or procedural orders of an administrative body are not reviewable by the Circuit Court of Appeals, and this brings us to our starting point, namely, whether what happened here was in effect a final order commanding or directing something to be done. In the case of **Mallory Coal Company v. National Bituminous Coal Commission**, 99 F. (2d) 339, we endeavored to review this question in the light of the decisions of the Supreme Court and to lay down a test as a guide to ourselves in determining the question. We said:

> "'Underlying all these tests of appellate jurisdiction is the fundamental requirement that the person seeking review must first have exhausted his administrative remedy. If the order in the particular case is definitive rather than preliminary or procedural; if the order operates particularly upon the person seeking review, rather than upon the world generally or upon a large group of interested persons; if the order was entered in a proceeding, adversary in character, after notice given, with a hearing at which witnesses were examined and points of law argued, and in which findings of fact were made; if a petition for rehearing was filed urging, upon the Commission, the objection to the order now urged

for the consideration of the courts; each of these circumstances—and more particularly all of them together—may indicate that the administrative remedy has been exhausted and that it is time for judicial review. Until that time comes, the matter should remain in the control of the administrative agency.'

"Examined in the light of this formula, the decision of the Board in the case in hand contains all the elements we believed to be necessary to make it reviewable under the statute. The proceeding out of which it emerged was neither preliminary nor incident to another proceeding. It concerned a controversy affecting the vital interests of two rival unions. It was begun and concluded for the purpose of settling the dispute. It was authorized by the statute to be made and so far as concerned the unions it was final. Its actual effect was to eject petitioner from the controversy. The suggestion that petitioner might have induced the employer to reject the finding and subject himself to an unfair labor proceeding and thus secure a court review, is wholly beyond the point. Petitioner had no control of the employer, and here the petition shows that the employer, acting within the spirit as well as the letter of the Act, promptly obeyed the Board's decision and entered into a contract in accordance with its terms. So that what happened was precisely what in a proper case the Act designed should happen—but, as we have seen, with the result that petitioner, in the localities in which its members constituted a majority, was—if the Board's decision as to the representative unit is valid—deprived of the very thing which petitioner insists it was the purpose of Congress to secure and protect. We had thought that whether an order or decree is final is not to be determined by the name which the court or board gives it but should be decided on consideration of its essence, its substance, its intrinsic nature. Or in other words—what is done by it. The decision in

question undoubtedly operated particularly upon petitioner. It was an adversary party. The decision and the refusal to rehear closed the controversy and completely exhausted petitioner's administrative remedies. • • •"

"The decision and the refusal to rehear closed the controversy and completely exhausted petitioner's administrative remedies. But, notwithstanding all of this, we think we are bound to hold that the 'decision' was not an 'order' as that term is defined in **Shannahan v. United States**, 303 U. S. 596, and in **Shields v. Utah Idaho Central Railroad Co.**, .. U. S. .. (decided December 5, 1938).

"In the Shannahan case the controversy involved the right of an electric railroad to be exempt from the scope of the Railway Labor Act under a proviso excluding street, interurban, or suburban railways. The Act authorized and directed the Interstate Commerce Commission upon request of the Mediation Board to 'determine' whether the line fell within the terms of the proviso. The Commission determined it did not. An appeal was taken under the provisions of the Urgent Deficiencies Act to set aside the decision. The Commission challenged jurisdiction of the court on the ground that the 'determination' of the Commission was not an order, and on hearing it was so decided and the bill dismissed. On appeal to the Supreme Court the decision was affirmed, and it was said the 'determination' was not an order at all and was no more than a 'decision on a controverted matter.' And in **Shields v. Utah Idaho Central Railroad Co.**, which shortly followed, the Court said a 'determination' or 'decision' by an administrative body may be definitive, may be legal, and may be binding as to all parties concerned, but it is still not an 'order' if it does not also command or direct a particular thing to be done and, because it is not an order, it is not appealable and is subj (fol. 79) ject to challenge and judicial review only by bill in equity.

"Accepting, as we must, this restrictive definition

and applying it to the case at hand, we hold that, though the decision here was required by the Act to be made and to be made on the evidence and argument after judicial hearing and though it was definitive, adversary, binding, final, and in this case struck at the very roots of petitioner's union and destroyed its effectiveness in a large geographical area of the Nation, it was not an order because the Act did not require it to be made in the language of command, and hence is reviewable—as was held in Shields case, supra, and in **Utah Fuel Co. v. National Bituminous Coal Commission**, . . U. S. . . (decided Jan. 30, 1939)—only in an independent suit in equity commenced in a District Court.

"Petition dismissed."

As the court below has recognized, appellants, by reason of the Board's decision and order certifying a competing and rival union as the exclusive bargaining agency for all longshore employees in a large geographical section of the United States are effectively eliminated from engaging in their business of representing longshore employees in that district. The order has as effectively deprived appellants of their status as a collective bargaining representative as if they, themselves, had been ordered to quit doing business on the West Coast. The employers, through an association, have entered into a contract with the C. I. O. unions, giving the C. I. O. members a preferential employment status, and, for all that petitioners have power to prevent, an out-and-out closed shop contract may likewise be entered into, thereby not only depriving appellants of their right to engage in business as labor organizations, but, what is worse, also depriving their members of their very livelihood by securing their dismissal and replacement with members of the rival organization.

B. **Shannahan and Shields Cases Are Not Determinative.**

Before proceeding with a discussion of the Rochester decision and its application to the present case it should be pointed out that the court below erroneously construed the Shannahan and Shields cases to require a dismissal of our petition.

It is true that the language used in the Shannahan and Shields cases indicates that a test of a final order is that it be made in the language of a command and that it direct a particular thing to be done. It is submitted, however, that the court below followed the language rather than the theory of these cases. Neither of these decisions was based on the fact that the order or orders there involved did not command a particular thing to be done. Rather, the sole rationale of these decisions was that the effectiveness of the order involved depended on some further future administrative action. As far as we have been able to ascertain this Court has never decreed the nonreviewability of an order on the sole and specific basis that the order was not framed in the language of a command and did not direct a particular thing to be done. Obviously, such a superficial distinction could quite easily afford opportunity for disregard of fundamental rights by the simple device of effecting a change in the form of an order without altering in any way its substance.

In the Shannahan case the Interstate Commerce Commission had determined upon application of the National Mediation Board that the Chicago, South Shore and South Bend Railroad was not within a **proviso** exempting certain street railways from the Railway Labor Act, and that the railroad was subject to the Railway Labor Act. Before any adverse result could obtain from this finding an additional proceeding would have to be instituted by the Mediation Board at some time in the future. Until that was done no status or right was in any way affected.

In the Shields case, which was based solely on the Shannahan case, the Interstate Commerce Commission had found that the Utah Idaho Central Railroad Company, like the Chicago, South Shore and South Bend Railroad involved in the Shannahan case, was not within the exemption of certain street railways from the Railway Labor Act, and that the railroad was subject to the Railway Act. The Court found that the Commission's determination was binding and final, but was not an order which could be appealed for the reasons stated in the Shannahan case. In the Shields case, however, the Mediation Board, pursuant to the Interstate Commerce Commission's findings, had ordered the carrier to post a notice that labor disputes would be handled under the Railway Labor Act. Disobedience of this order was punishable in a criminal suit by the United States Attorney. The Court accordingly permitted the petitioner relief under the equity jurisdiction of a District Court. Both of these cases, however, go no further than to state that where "the order sought to be reviewed does not of itself adversely affect complainant, but only affects his rights adversely on the contingency of future administrative action" (Rochester case), then it is not a final reviewable order. That the above was the rationale of these decisions, and that they did not have their basis in the language used therein which the court below felt compelled to follow is clearly indicated by this Court in the Rochester case (see 83 L. Ed. Adv. sheets, at page 722). The fundamental reason for denying review in these cases, as well as in the case of **United States v. Los Angeles Ry. Co.**, 273 U. S. 299, relied on by the Board and used as authority in the Shannahan case, is that resort to the courts where a complainant's rights could be affected adversely only on the contingency of future administrative action, was either premature or beyond their province.

The Los Angeles case involved a situation where an order as to the value of property depended upon future action by the Interstate Commerce Commission to have any adverse affect. Those very matters determining reviewability which were stated by Justice Brandeis to be absent in the Los Angeles case are involved in the present case. If the language in the following portion of Justice Brandeis' decision were stated affirmatively it would fully describe the present case:

> "* * * The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, anything; **which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility;** which does not subject the carrier to any liability, civil or criminal; **which does not change the carrier's existing or future status or condition; which does not determine any right or obligation** * * *."

One of the former tests which the Rochester decision recognized as having consistent application in all earlier cases is that an order is reviewable if it has the legal effect of changing a status quo or permitting what was previously not allowed or compelling what was previously not required.[8] Under this test the appellants are certainly entitled to a review. Its status quo has been radically altered and the Board has compelled bargaining on a coast-wide basis through a rival organization, a status previously not required.

The Board argues that the order in the present case, as in the Shannahan and Los Angeles cases, depends for its effectiveness on future action by the Labor Board—the issuance of an order in an unfair labor practice proceeding. Such an argument entirely ignores the realities.

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[8] See footnote 24, Rochester Telephone Co. v. U. S., 83 L. Ed., at page 728.

The present order, so far as the appellant unions are concerned (although concededly the case is different if an employer were complaining), becomes effective immediately the decree is issued. While it may be that the employer can forestall the effect of an order on him, the union cannot, not only by a deference to the provisions of the National Labor Relations Act, but by the practical exigencies of the situation. Immediately that the employer has recognized the opposing union as the exclusive representative of all employees in a comprehensive unit designated by the Board, which the employer has done in the present case, the complaining union has absolutely no alternative but to abide by the decree unless he is permitted to appeal to a court of law. It is fatuous to say that the appellants can refuse to recognize the decision when there is no one with whom they can deal. Nothing remains for the appellants but to suffer themselves to go out of existence. The Board well realizes this fact, and well realizes the conclusive effect of its decree in the present case. It is sophistry of the most vicious sort to argue that the appellants here "can simply ignore" the order of the Board. Further, it is most reprehensible for the Board to argue, as it did before the court below, that its final determination in the present case entered after prolonged hearings, and accompanied by lengthy findings of fact and conclusions of law, has no effect whatsoever, can be obeyed or disobeyed at the will of the party against whom it is directed, has no force or effect in law, and is a mere determination of fact amounting to no more than an act of grace. The Board seemingly would deprecate the express command set forth in Section 8 (5) of the act that it shall be an unfair labor practice for an employer to refuse to bargain collectively with the representative of a majority of his employees and the substantive provision contained in section 9 (a) prescribing that:

"* * * Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *."

"Negative Orders" as Classified by Rochester Case.

In the Rochester case this Court classified orders formerly termed "negative" and held nonreviewable into three groups:

"(1) Where the action sought to be reviewed may have the effect of forbidding or compelling conduct on the part of the person seeking to review it, but only if some further action is taken by the Commission * * *.

"(2) Where the action sought to be reviewed declines to relieve the complainant from a statutory command forbidding or compelling conduct on his part * * *.

"(3) Where the action sought to be reviewed does not forbid or compel conduct on the part of the person seeking review but is attacked because it does not forbid or compel conduct by a third person."

After re-examining the cases in the last two classifications the Court found the orders therein involved were properly reviewable. It is submitted that the situation here present is within the third classification and not within the first classification, where the Shannahan and Los Angeles cases are placed. In the present case the order complained of refused to compel certain conduct by third parties; the employer, i. e., refused to prescribe the unit contended for by petitioners, the single employer unit, as being the largest unit authorized under the statute, thereby refusing

to compel the individual employers to bargain with a representative of appellants chosen by employees in single-employer units, in which units appellants concededly held a majority in a great number of cases. It can even be said that the present situation is also properly classified in group two, as being an order having the effect of placing the complainant outside of a statute or of a statutory command. In the present case the Board's order has the effect of placing the employer outside of the operation of the statute in so far as appellants' demand for recognition in their particlar units is concerned, thereby likewise placing appellants outside of the benefits of the act. At any rate, it is quite clear that the present situation is not within group one, and for that further reason the Shannahan and Shields cases are not controlling.

C. Rationale of Rochester Case Controlling.

The Rochester case contains for the first time a statement of ~~fonctional~~ criteria which are or should be determinative in considering the reviewability of administrative orders. In contrast to the multitude of "tests" set forth in previous decisions, these criteria derive essentially from a regard for the special nature and functions of administrative agencies. Without presuming to establish any new series of tests which can act as a universal formula, it can be generally stated that the Rochester case prescribes five fundamental prerequisites to court review:

(1) There must exist a "case" or "controversy" under Article III, Section 2, of the United States Constitution, and a review must not be sought of an interim step in a proceeding. As a corollary, administrative remedies must be exhausted.

(2) The conventional requisites of equity jurisdiction must exist.

(3) The statute must permit an appeal.

(4) Matters calling for technical knowledge pertaining to the subject with which the administrative tribunal are established to deal must first be passed upon by that tribunal.

(5) The range of issues open to review must be limited to questions affecting constitutional power, statutory authority, and the basic prerequisites of proof.

These requirements satisfied, a court can permit relief to a complainant without fear of obstructing administrative procedure.

The present case satisfies all of the requirements set forth above. Discussing their application to the present case in the aforementioned order we find that—

(1) A case or controversy exists over property rights which has been finally adjudicated by the Board. The order now being appealed is certainly not preliminary or procedural. The only purpose of the proceedings, lasting several weeks, was to determine the majority representative, and to determine the appropriate unit. All the testimony was devoted to that one end. No other relief was sought, or was intended. It dealt entirely with the merit of the controversy between the C. I. O. and the A. F. of L. as to the appropriate unit and as to the majority representative in the various units claimed by the two contending parties. Following the taking of such testimony the Board issued its findings of fact and conclusions of law in the form of a decision, in which it certified the C. I. O. as the exclusive representative of the entire west coast. This decision fixes conclusively appellants' status, privileges, licenses and rights. Further the present case involves a proceeding which was as adversary in character as any dispute in a court of law. Notice and a petition were issued, answers were filed by opposing parties, wit-

nesses examined, points of law argued, and findings of fact and conclusions of law were made by the Board at the conclusion of the hearings. Whatever administrative remedies might be available were finally exhausted by the filing of a petition for rehearing urging upon the Board the objections to the order now urged for consideration of the Court. These objections were overruled by the full Board and the petition for rehearing was dismissed.

(2) The fundamental requisites of equity jurisdiction are met by the fact that substantial property rights are being destroyed and the damage is irreparable.

(3) That the National Labor Relations Act authorizes the review being sought is argued at length in argument II, infra.

(4) In the present case all technical matters and all matters peculiarly within the knowledge of the National Labor Relations Board have been passed upon by that Board. The Appellate Court is not being asked to pass upon or review any matter requiring specialized knowledge or experience in the field of labor relations. Appellants seek solely a construction of the Wagner Act.

In the present case the appellants request a review by the Court of a pure question of law, of statutory construction—a determination which requires "an expertness" attendant more on the judiciary than on any administrative body. We emphasize this point in recognition of the proposals made by leading authorities on administrative law.[9] These proposals are based upon the tenuous distinction between questions of fact and conclusions of law.[10] They urge that where expertness is desirable to determine issues which formerly have been called issues of law (such as valuable in rate-making controversies), then the deci-

9 Landis, "The Administrative Process," page 114 et seq.

10 Dickinson, "Administrative Justice and the Supremacy of Laws in the U. S.," page 55.

sions of the administrative tribunal should be granted the same finality as is generally given to so-called factual determinations. Certainly it cannot be claimed by the Board that its determination of the question of its authority under the Act was one peculiarly in the performance of its administrative functions.

(5) The doctrine of administrative finality is respected. In the present case the request for review is limited to the question of the Board's authority under the Act to take the action it did and prescribe a unit larger than that of a single employer. This is solely a question of statutory construction.

It is respectfully submitted that the controlling principles of law and policy so lucidly expressed in the Rochester decision, when applied to the present case, compel the conclusion that the Circuit Court of Appeals had jurisdiction to review the Board's order in this case.

As previously mentioned, the possibility of a resort to a district court for a determination of the present issues, which are ordinarily exclusively determined by circuit courts and which are usually beyond the experience of district courts, is neither an effective, nor an expeditious, nor a final method of disposing of the issues or of protecting appellants' rights, and it is not the method of review contemplated by Congress. Congress expressly designated review only in courts of appellate jurisdiction, in the first instance. It should be noted that wherever and whenever appellants have attempted to seek a determination of the validity of an order entered in a representation proceeding they have invariably encountered the vehement opposition of the Board, which, relying on such cases as **Howard Myers et al. v. Bethlehem Shipbuilding Corp., Ltd.**, and **Howard Myers et al. v. Charles McKenzie et al.**, 303 U. S. 41, and **Newport News Shipbuilding and Dry Dock Co. v. Bennet F. Schauffler et al.**, 303 U. S. 54, and **Heller Bros.**

Co. v. Lind et al., 86 F. (2d) 862, and numerous other decisions of various district courts throughout the country, has successfully argued that under the National Labor Relations Act the district courts of the United States have no jurisdiction over any matter pertaining to the Labor Relations Board or its activities (Brief of National Labor Relations Board in American Federation of Labor et al., Plaintiffs, v. J. Warren Madden, individually, J. Warren Madden, Chairman et al., Civil Action No. 552, in the District Court of the United States for the District of Columbia, the appeal from mandatory injunction dismissed for lack of jurisdiction May .., 1939). Seemingly, if any review of the Board's actions is to be had, it must be in a circuit court of appeals.

CONCLUSION.

The decision of the Board in this case is not right and is not in conformity with the law. Former Chairman Biddle, of the former National Labor Relations Board, testifying before the Committee of Congress in March, 1935, when the precise question was up for consideration, in discussing the present provisions of section 9 of the Act, said:

> "Moreover, any arbitrary act of the Board in selecting the unit is subject to check or review by the court."

We pray the Court to sustain the contentions set forth in this brief so that a review of the Circuit Court of Appeals may be accorded the aggrieved union from arbitrary and unlawful action of the Board in selecting the unit, which in this instance will destroy numerous American Federation of Labor unions lawfully selected as their representative by the majority of the employees of an

employer, and in many instances by all of the employees of an employer.

Appellants respectfully submit, for the reasons hereinbefore set forth, that the judgment of the Court of Appeals for the District of Columbia be reversed.

Respectfully submitted,

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Dated November 4, 1939,
321 Tower Building,
Washington, D. C.

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No. 70

In the Supreme Court of the United States

OCTOBER TERM, 1939

AMERICAN FEDERATION OF LABOR, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AND PACIFIC COAST DISTRICT INTERNATIONAL LONGSHOREMEN'S ASSOCIATION No. 38, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court below (R. 69–75) is reported in 103 F. (2d) 933. The opinion of the National Labor Relations Board is reported in 7 N. L. R. B. 1002 (R. 6–58).

JURISDICTION

The decree below was entered on February 27, 1939 (R. 75). The petition for certiorari was filed

on May 26, 1939. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (f) of the National Labor Relations Act.

QUESTION PRESENTED

Is a certification issued under Section 9 (c) of the National Labor Relations Act that a particular labor organization has been designated as representative for purposes of collective bargaining by the majority of the employees in an appropriate unit reviewable by the Court of Appeals for the District of Columbia under Section 10 (f) of the Act?

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449; U. S. C. Supp. IV, Title 29, Sec. 151 *et seq.*) are set forth in the Appendix, *infra*, pp. 17–24.

STATEMENT

The International Longshoremen's and Warehousemen's Union, District No. 1 (I. L. W. U.), affiliated with the Congress of Industrial Organizations (C. I. O.) petitioned the National Labor Relations Board to certify it pursuant to Section 9 (c) of the Act, as the exclusive bargaining agent for the longshoremen on the Pacific Coast (R. 8). Petitioners herein, who are the American Federation of Labor, International Longshoremen's Association (I. L. A.), and Pacific Coast Dis-

trict International Longshoremen's Association No. 38, opposed this application. After lengthy hearings and a brief filed on behalf of the employers' associations (R. 10), the Board entered its findings of fact, conclusions of law, and certification (R. 6–58). The Board found that the employees engaged in longshore work in the Pacific Coast ports of the United States for the companies which are members of certain employers' associations [1] constituted a unit appropriate for purposes of collective bargaining under the Act, and certified that the I. L. W. U. had been designated by a majority of the employees in that unit as their representative for purposes of collective bargaining (R. 44–45).

The basic facts found by the Board were as follows: Until 1937 the longshoremen on the Pacific Coast were members of petitioners, the I. L. A. and the A. F. of L. (R. 10–11). Between 1934 and 1937, at the insistence of the I. L. A., collective bargaining on the Pacific Coast was carried on on a coast-wide basis; this resulted in agreements between the I. L. A. and the various employers' associations (R. 12–14, 19, 20). In 1937 a large ma-

[1] Petitioners assert (Pet. pp. 2, 3, 14) that the Board designated all longshore employees on the Pacific Coast as the appropriate unit for collective bargaining. That is incorrect. The Board's action was limited to the employees of members of the affiliated employers' associations who acted as a unit in bargaining with their employees. It is true that almost all companies using longshore labor are members of these associations (R. 18–19).

jority of the members of I. L. A. on the Coast voted to affiliate with the C. I. O. (R. 15–16).[2] After the I. L. W. U. had been chartered by the C. I. O., all but four of the I. L. A. locals, containing only 904 out of 11,479 longshoremen, applied for I. L. W. U. charters (R. 17–18). The employees, through the I. L. W. U., continued to bargain collectively with the employers' associations, which in June 1937 had united into a single Waterfront Employers' Association of the Pacific Coast (R. 20). In July 1937 the agreements between the longshoremen and the employers in the associations were continued on a coast-wide basis by the associations and the I. L. W. U. (R. 17, 24, 30–31).

Cards introduced into evidence at the hearing showed that 9,557 out of a total of 12,860 longshoremen employed by members of the associations had designated the I. L. W. U. as their representative (R. 44).

The Board held that the statute permitted it to find that the employees of members of an association of employers were an appropriate unit for purposes of collective bargaining (R. 28–29),[3] and that

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[2] The longshoremen's vote was 7,073 for affiliation with the C. I. O. and 2,263 opposed (R. 16).

[3] The Board is given authority to determine that the "employer" unit is the unit most appropriate for purposes of collective bargaining. Section 9 (b). The Act includes within the term "employer" "any person acting in the interest of an employer, directly or indirectly" (Section 2 (2)), and defines "person" as including "one or more individuals, partnerships, associations, corporations . . ." (Section 2 (1)).

in the light of the past and existing organization of the employers and the employees, the employees of the members of the employers' associations were the appropriate unit in the instant case (R. 26–29). Since the I. L. W. U. was shown to represent a majority of those employees, it was certified as their exclusive representative for purposes of collective bargaining. Petitioners filed objections and exceptions, which were overruled by the Board, and a motion for rehearing, which was denied (R. 59–62).

The petitioners thereupon filed this proceeding in the Court of Appeals for the District of Columbia, seeking to have the certification set aside on the ground that the appropriate unit should have been limited to the employees of each individual employer (R. 1–5). The Board moved to dismiss the petition on the ground that the court had no jurisdiction to review the certification (R. 64–68). The motion to dismiss was granted on the ground that the certification was not an order and hence was not reviewable under the Act (R. 69–75).[1] Leave to file a petition for rehearing was subse-

[1] The opinion of the Court of Appeals suggests, we think erroneously, that plaintiff might obtain relief in an independent suit in equity commenced in a district court. On March 29, 1939, petitioners filed suit in the District Court for the District of Columbia for a mandatory injunction to compel withdrawal of the certification. *American Federation of Labor* v. *Madden*, civil action No. 2214. By stipulation of the parties this suit is being continued pending final disposition of the instant case.

quently denied on the ground that the term of court had expired (R. 75–76).

ARGUMENT

We join in the request that a writ of certiorari be granted in this case. The question of the jurisdiction of the circuit courts of appeals to review certifications issued by the National Labor Relations Board is an important one, and the decision below conflicts with a decision rendered by the Circuit Court of Appeals for the Sixth Circuit. *International Brotherhood of Electrical Workers* v. *National Labor Relations Board,* decided June 28, 1939 (C. C. A. 6th).[5]

We believe, however, that the decision below was plainly correct. It may therefore be appropriate that a brief statement of the Board's position be placed before the Court.

The issue in the instant case is solely one of statutory construction—does the National Labor Relations Act empower the Court of Appeals for the District of Columbia to review a certification issued under Section 9 (c) of the National Labor Relations Act? The language of the Act, reenforced by its legislative history, demonstrates that the court below had no such jurisdiction.

Petitioners rely, as they must, upon Section 10 (f) of the Act as the basis for the jurisdiction of the court below. That section, which deals with and is headed PREVENTION OF UNFAIR LABOR

[5] A petition for a writ of certiorari will be filed on behalf of the Board in that case.

PRACTICES, provides in part, in subdivision (f), that—

> Any person aggrieved by a *final order* of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit *wherein the unfair labor practice in question was alleged to have been engaged in* or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. [Italics supplied.]

From the above language it is plain that as a prerequisite to review (1) there must be a "final order," and (2) there must be an "unfair labor practice in question."

As the court below held, a certification issued under Section 9 (c) is not an order. *United Employees Association* v. *National Labor Relations Board*, 96 F. (2d) 875 (C. C. A. 3d); cf. *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515, 562; *Shannahan* v. *United States*, 303 U. S. 596; *Cupples Co. Manuf'rs* v. *National Labor Relations Board*, 103 F. (2d) 953, 955 (C. C. A. 8th); *Wallach's, Inc.* v. *Boland*, 277 N. Y. 345.* It is not an

* In the *United Employees* case, *supra*, the court declared that a Board certification "is not a final order. It is in fact not an order at all, but simply the certification of a fact which may be entirely ignored and disregarded by the Association and the Company." In the *Virginian Ry.* case, 300 U. S. at 562, this Court declared that a certification by the

order in form, but a mere certification of the existence of a fact; and since it does not compel anyone to do anything, it is not an order in substance.[1] Failure to recognize the representative certified does not subject anyone to any compulsion unless and until a separate proceeding instituted under Section 8 (5) and 10 of the Act results in the issuance of an order against the employer, which is reviewable.

The *Shannahan* case held that a finding of fact by the Interstate Commerce Commission as to the status of an electric railway under the Railway Labor Act was not an "order" within the meaning of the Urgent Deficiencies Act. The finding there became enforceable only upon subsequent action by the National Mediation Board. Here the certification by the National Labor Relations Board—which is also merely an advisory finding of fact—becomes enforceable only after the issuance of an order in an unfair labor practice proceeding. The fact that the subsequent proceeding is to be before the same body as the original one obviously does not distinguish the two situations. If a finding of facts is not an "order" within the meaning of the Urgent Deficien-

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National Mediation Board under the Railway Labor Act was not an "order" but an "ultimate finding of fact."

[1] The issuance of a certification is not a prerequisite to the existence of an obligation to bargain collectively with the representative designated by the majority of the employees in an appropriate unit. That obligation is imposed by Section 8 (5), and is frequently enforced when no certification has been issued. The certification serves only as an informative determination for the benefit of the parties concerned.

cies Act, as the *Shannahan* case holds, it clearly is not a "final order" within the meaning of the National Labor Relations Act. Accordingly, we submit that the court below properly regarded the *Shannahan* case as controlling.

Plainly, when a certification is issued, there is no "unfair labor practice in question" unless and until the Board has found an unfair labor practice to exist in a separate proceeding instituted under Section 10.

That Section 10 (f) of the Act was intended only to permit review of orders issued in proceedings brought to prevent unfair labor practices and not of certifications issued under Section 9 (c) (except when called into question in Section 10 proceedings) appears clearly when Sections 8, 9, and 10 of the Act are read together. Section 8 states that certain types of conduct by employers shall constitute unfair labor practices. Section 10 is entitled "PREVENTION OF UNFAIR LABOR PRACTICES." Section 10 (a) empowers the Board, "as hereinafter provided, to prevent any person from engaging in any unfair labor practice * * * affecting commerce." Section 10 (b) provides that when any person is charged with engaging in any unfair labor practice the Board may issue a complaint and hold a hearing. Section 10 (c) allows the Board to make findings of fact, and if it finds that an unfair labor practice has been committed, to issue a cease and desist "order." Section 10 (e) permits the Board to petition the circuit court of appeals in any circuit

"wherein the unfair labor practice in question occurred or wherein [respondent] resides or transacts business" for the enforcement of "*such* order" upon the basis of the record before the Board. The court may enter a decree enforcing, modifying, or setting aside the order of the Board. Section 10 (f) provides, as has been pointed out, that:

> Any person aggrieved by a *final order* of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit *wherein the unfair labor practice in question was alleged to have been engaged in* or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside [italics supplied].

The paragraph further proceeds:

> Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree *enforcing, modifying, and enforcing as so modified,* or setting aside in whole or in part the *order* of the Board; * * * [italics supplied].

Section 10 as a whole clearly was designed to establish a procedure in accordance with which the

Board might enter orders prohibiting unfair labor practices, and pursuant to which the circuit courts of appeals, on petition of either the Board or an aggrieved party, might review such orders. That such is the scope of the section appears plainly from its title and from the language of each of the paragraphs preceding paragraph (f). The position of that paragraph as an integral part of Section 10 and the reference in it (as in paragraph (e)) to the circuit "wherein the unfair labor practice in question was alleged to have been engaged in" demonstrate that it was intended to have the same coverage as paragraph (e). This is confirmed by the declaration in paragraph (f) that the reviewing court shall proceed in the same manner and with the same powers as on an application by the Board under paragraph (e). Plainly, paragraphs (e) and (f), which differ only in the party instituting the proceeding, were both intended to apply to the same subject matter. Cf. *Ford Motor Co.* v. *National Labor Relations Board,* 305 U. S. 364, 369.

The above analysis of Section 10 demonstrates affirmatively that it applies only to the review of Board orders entered in unfair labor practice cases. That certifications in particular were not intended to be directly reviewable appears from Section 9. Section 9 (a) declares that the representative designated by the majority of the employees in a unit appropriate for collective bar-

gaining purposes shall be the exclusive representative of all the persons in such unit. Section 9 (b) authorizes the Board to determine the appropriate unit. Section 9 (c) states that when a question affecting commerce arises concerning representation, the Board may investigate and certify the name of the representative designated. Section 9 (d) then provides:

> Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Section 9 (d) thus establishes a method whereby review of Board certifications may be had when an order made pursuant to Section 10 (c)—i. e., in a proceeding to prevent unfair labor practices—is based upon facts certified.* It is clear from this

* Such a case most frequently arises when an order to bargain collectively, pursuant to Section 8 (5), is based in part upon facts found in a proceeding under Section 9 (c).

provision, particularly when taken together with Section 10, that certifications issued under Section 9 (c) were not intended to be otherwise reviewable.

The legislative history of the Act also shows plainly that it was the intention of Congress that certifications be reviewable only as provided in Section 9 (d). The Senate Committee Report (S. Rept. 573, 74th Cong., 1st Sess., p. 14) declares:

> Section 9 (d) makes it absolutely clear that there shall be no right to court review anterior to the holding of an election. An election is the mere determination of a preliminary fact, and in itself has no substantial effect upon the rights of either employers or employees. There is no more reason for court review prior to an election than for court review prior to a hearing. *But if subsequently the Board makes an order predicated upon the election, such as an order to bargain collectively with the elected representatives, then the entire election procedure becomes part of the record upon which the order of the Board is based, and is fully reviewable by any aggrieved party in the Federal courts in the manner provided in Section 10. And this review would include within its scope the action of the Board in determining the appropriate unit for purposes of the election. This provides a complete guarantee against arbitrary action by the Board.* [Italics supplied.]

The House Committee Report (H. Rept. 1147, 74th Cong., 1st Sess., p. 23) similarly states:

> As previously stated in this report, the efficacy of Public Resolution 44 has been substantially impaired by the provision for court review of election orders prior to the holding of the election. Section 9 (d) of the bill makes clear that there is to be no court review prior to the holding of the election, and provides an exclusive, complete, and adequate remedy whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an election or other investigation pursuant to section 9 (c). The hearing required to be held in any such investigation provides an appropriate safeguard and opportunity to be heard. Since the certification and the record of the investigation are required to be included in the transcript of the entire record filed pursuant to section 10 (e) or (f), the Board's actions and determinations of fact and law in regard thereto will be subject to the same court review as is provided for its other determinations under sections 10 (b) and 10 (c).

In the foregoing statements it is clear that in referring to "holding of an election" it was intended to include all steps in the proceeding instituted under Section 9, and that Section 9 (d), read together with Section 10, was designed to permit judicial review of a certification only in a proceeding in which an order

relating to an unfair labor practice was issued.* This also appears plainly from the statement of Senator Walsh, Chairman of the Senate Committee, in response to a question on the floor of the Senate (79 Cong. Rec. 7658):

> Mr. COUZENS. Would the passage of the pending bill remove the appeals to the courts?
>
> Mr. WALSH. Yes; it would because it limits appeals. It provides for review in the courts only after the election has been held and the Board has ordered the employer to do something predicated upon the results of the election.

Petitioner seeks to avoid the effect of the intention of Congress thus clearly manifested by the argument that *Rochester Telephone Corp.* v. *United States*, No. 481, decided April 17, 1939, calls for a different result. The argument is without weight.

The issue, of course, is the meaning of the National Labor Relations Act. The *Rochester Telephone* case and the companion case of *Federal Power Commission* v. *Pacific Power & Light Co.*, No. 508, decided April 17, 1939, indicate plainly that the language and meaning of the statute creating the machinery for judicial review must be respected. These cases hold that the distinction between negative and affirmative is no longer to be

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* The propriety of judicial review prior to the holding of an election is directly involved in *National Labor Relations Board* v. *International Brotherhood of Electrical Workers*, *supra*, p. 6. The petition for certiorari in that case will contain, therefore, a more extended discussion of that question.

deemed of importance in determining the reviewability of administrative orders. Neither case, however, suggests that the statutory provisions are also of no importance. In the *Rochester Telephone* case the Court stated that one of the hurdles which a complainant must clear in seeking judicial review under the Urgent Deficiencies Act is—

> the specific terms of the statute granting to the district courts jurisdiction in suits challenging "any order" of the Commission.

Moreover, the *Rochester Telephone* case indicates that the authority of cases such as *Shannahan* v. *United States*, 303 U. S. 596 (see p. 8, *supra*) is not impaired in so far as they hold that administrative action which affects rights only on the contingency of future administrative action, or which does not command that anything be done or not done, is not reviewable judicially. See also *United States* v. *Los Angeles, etc., R. Co.*, 273 U. S. 299.

Respectfully submitted.

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JULY 1939.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C. Supp. IV, Title 29, Sec. 151 *et seq.*) are as follows:

DEFINITIONS

SEC. 2. When used in this Act—

(1) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from per-

mitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other

conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain [1] such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made

[1] So in original.

and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district

court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the

Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such

filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101–115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

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OCTOBER TERM, 1939

No. 70

AMERICAN FEDERATION OF LABOR, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AND PACIFIC COAST DISTRICT INTERNATIONAL LONGSHOREMEN'S ASSOCIATION NO. 38, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 69–75) is reported in 103 F. (2d) 933. The decision and certification of the National Labor Relations Board (R. 6–58) are reported in 7 N. L. R. B. 1002.

JURISDICTION

The decree below was entered on February 27, 1939 (R. 75). The petition for certiorari was filed on May 26, 1939. The jurisdiction of this Court

rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether a certification issued by the National Labor Relations Board under Section 9 (c) of the National Labor Relations Act that a particular labor organization is the collective bargaining representative of the employees in a designated unit is reviewable under Section 10 (f) of the Act.

2. If the certification is held to be reviewable, the Court may also care to decide whether the Act authorizes the Board to decide that a unit consisting of the employees of members of certain employers' associations is appropriate for purposes of collective bargaining.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (c. 372, 49 Stat. 449, 29 U. S. C. Supp. IV, Sec. 151 *et seq.*) are set forth in the Appendix.

STATEMENT

On January 19, 1938, the International Longshoremen's and Warehousemen's Union, District No. 1 (hereinafter called the I. L. W. U.), affiliated with the Congress of Industrial Organizations (C. I. O.), filed with the Regional Director of the National Labor Relations Board in San Francisco a petition alleging that a question affecting com-

merce had arisen concerning the representation of the longshoremen on the Pacific Coast, and requesting the Board, pursuant to Section 9 (c) of the Act, to investigate the controversy and certify the names of the representatives designated by the longshoremen (R. 7–8). On January 29, 1938, the Board, pursuant to its Rules and Regulations, ordered that the Regional Director conduct an investigation and provide for appropriate hearings pursuant to Section 9 (c) of the Act, and that the proceeding be consolidated for purposes of hearing with two similar proceedings [1] initiated by locals of the I. L. W. U. in regard to the representation of the longshoremen in certain ports on the Pacific Coast (R. 8).

Thereafter, commencing February 15, 1938, and ending March 19, 1938, pursuant to notice, hearings were held before a trial examiner in Los Angeles and San Pedro, California; Seattle, Washington; and Portland, Oregon (R. 8–9). Petitioners herein, the I. L. W. U., the Board, and certain employers' associations and the members thereof, were represented by counsel and participated in the hearings (R. 8–9). At the hearings petitioners objected to the jurisdiction of the Board on the grounds that a contract between the employers and the petitioner, Pacific Coast District International

[1] The petition in one of these proceedings was withdrawn on February 4, 1938, and the proceeding was severed (R. 8).

Longshoremen's Association, No. 38 (hereinafter called the I. L. A.), deprived the Board of jurisdiction and that the Board was without power to find that a unit embracing more employees than those of an individual employer was appropriate for purposes of collective bargaining (R. 9). The Trial Examiner overruled these objections (R. 9). At the close of the hearings the trial examiner apprised the parties of their right to submit briefs to the Board, and on April 30, 1938, a brief was filed with the Board on behalf of the employers' associations and members thereof (R. 10). Thereafter, on June 20, 1938, the Board rendered its decision and certification (R. 7–58).

The Board found, in substance, as follows: From 1909 until June 1937 the organized longshoremen on the Pacific Coast were members of the I. L. A., affiliated with the American Federation of Labor (A. F. of L.) (R. 11).[2] Early in 1934 a convention of I. L. A. locals formulated certain demands upon the employers, including a demand that there be one coast-wide agreement, instead of separate port agreements, covering the longshoremen (R. 11–12). On May 9, 1934, after the demand for a coast-wide

[2] Petitioner's statement (Br. 3) that the I. L. A. had "for many years prior to the decision of the Board" represented "thousands" of Pacific Coast longshoremen is misleading in that in June 1937 a large majority of the members of the I. L. A. voted to change their affiliation and since that time have been represented by the I. L. W. U. (See *infra*, p. 6.)

agreement had been reiterated, all the longshoremen on the Pacific Coast went out on strike (R. 12). The strike was settled by an agreement for arbitration (R. 12–13), and in October 1934 an arbitration award was made which consisted of a series of agreements between the I. L. A. and the associations of employers covering basic wages and hours, and providing for the establishment of jointly operated hiring halls (R. 13).

The award was renewed in 1935 pursuant to an automatic renewal clause (R. 13). In 1936 both parties gave notice of a desire to modify the terms of the award and on February 4, 1937, the award was followed by a nominal amendment consisting of an agreement between the I. L. A. and the Coast Committee for the Shipowners, which had been set up by the employers' associations to act on their behalf (R. 13–14). Under this coast-wide agreement, preference in employment was to be given to members of the I. L. A. and the hiring halls in each port were to be maintained and operated by labor relations committees, composed of representatives of the longshoremen and of the employers' associations (R. 14). The committees, in addition, were to adjudicate all grievances relating to working agreements and discharges (R. 14). The agreement also provided for further negotiations with respect to certain rates of pay and maximum loads, and in April 1937 these negotiations resulted in two further coast-wide contracts (R. 14). Several

locals of the I. L. A. disapproved these contracts, but they were bound by the majority vote (R. 14).

In June 1937 a large majority of the longshoremen and other members of the I. L. A. voted to affiliate with the C. I. O. (R. 14–16). Thereafter, the I. L. W. U. was chartered by the C. I. O. (R. 17). All the I. L. A. locals, with the exception of four in four ports in the Puget Sound area, applied for charters from the I. L. W. U. (R. 18). At the time of the Board's decision, there were about 10,575 Pacific Coast longshoremen in the I. L. W. U., and only about 904 in the locals which remained with the I. L. A. (R. 18).

In July 1937 the agreement of February 4, 1937, was continued for another year by the I. L. W. U. and the Waterfront Employers Association of the Pacific Coast (R. 17), which had been authorized by the regional employers' associations to act in their behalf (R. 18–24). The employers, through the associations of which they were members and by whose collective bargaining contracts they were bound so long as they remained members (R. 22), acquiesced and joined with the I. L. W. U. in executing the agreement, except in the four Puget Sound Ports which had voted against affiliation with the C. I. O. (I. L. W. U.), and gave preference of employment to I. L. W. U. members (R. 30–31). However, both the employers and the associations refused to give formal recognition to the I. L. W. U. (R. 31–32).

The Board concluded that a question affecting commerce had arisen concerning representation (R. 44). In view of the coast-wide character of the organization and collective bargaining of the employers and longshoremen since 1934, and of the facts that the individual employers functioned almost entirely through their associations in dealing with the longshoremen (R. 18–25), that wages, hours, methods of hiring and of settling grievances, and other terms and conditions of employment were uniform on the Pacific Coast (R. 27–28), and that the history of bargaining by the longshoremen showed that they desired a coast-wide unit and that such a unit would best insure to them the full benefit of their rights under the Act (R. 26–27), the Board further concluded that all Pacific Coast longshoremen who worked for the members of the employers' associations constituted the appropriate unit for purposes of collective bargaining (R. 44–45). The Board also held that the Act authorized it to decide that such a unit was appropriate (R. 28–29), and that, as shown by signed cards introduced into evidence at the hearings, the I. L. W. U. had been designated by 9,557 of the total 12,860 longshoremen in the unit as their representative and was therefore the exclusive representative of the longshoremen in the unit (R. 44). Accordingly, pursuant to Section 9 (c), the Board issued its certification that the I. L. W. U.

had been so designated and was the exclusive representative[3] (R. 45).

On August 15, 1938, petitioners filed objections and exceptions to the certification, together with a motion for rehearing (R. 59–61). On August 27, 1938, the Board overruled the objections and exceptions, and denied the motion (R. 61–62).

On September 29, 1938, petitioners, purportedly pursuant to Section 10 (f) of the Act, filed in the

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[3] Petitioners' statement (Br. 3) that the Board certified the I. L. W. U. as the exclusive representative of "all employees of all longshore employers" in Pacific Coast ports is inaccurate.

The certification is as follows:

"By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Section 8, of National Labor Relations Board Rules and Regulations—Series 1, as amended,

"IT IS HEREBY CERTIFIED that International Longshoremen's and Warehousemen's Union, District No. 1, has been designated and selected by a majority of the workers *who do longshore work* in the Pacific Coast ports of the United States for the companies *which are members* of Waterfront Employers of Seattle, Waterfront Employers of Portland, Waterfront Employers' Association of San Francisco, Waterfront Employers' Association of Southern California, and Shipowners' Association of the Pacific Coast, as their representative for the purposes of collective bargaining, and that, pursuant to the provisions of Section 9 (a) of the Act, International Longshoremen's and Warehousemen's Union, District No. 1, is the exclusive representative of all such workers for the purposes of collective bargaining, in respect to rates of pay, wages, hours of employment, and other conditions of employment." (Italics supplied.)

court below their petition to review and set aside the Board's certification (R. 1–5). On October 22, 1938, the Board filed a motion to dismiss the petition on the ground that the court was without jurisdiction to review the certification (R. 64–68). After argument of the motion to dismiss (R. 68), the court, on February 27, 1939, rendered its decision dismissing the petition on the ground that the certification was not an order and hence was not reviewable under the Act[1] (R. 69–75).

After the decision of this Court in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, petitioners applied to the court below for leave to file a petition for rehearing, but the application was denied on the ground that the term of court had expired (R. 75–76). Thereupon petitioners filed their petition for writ of certiorari, which was granted on October 9, 1939.

SUMMARY OF ARGUMENT

I

Petitioners contend that the court below had jurisdiction to review the Board's certification

[1] The opinion of the court below suggests, we think erroneously (see *infra*, pp. 32–38), that petitioners might obtain relief in an independent suit in equity commenced in a district court. On March 29, 1939, petitioners filed suit in the District Court for the District of Columbia for a mandatory injunction to compel withdrawal of the certification. *American Federation of Labor* v. *Madden*, civil action No. 2214. By stipulation of the parties this suit is being continued pending final disposition of the instant case.

under the provision of Section 10 (f) of the Act that "any person aggrieved by a final order of the Board * * * may obtain a review of such order * * * in the Court of Appeals of the District of Columbia. * * *" The holding of the court below overruling this contention is in accord with the decision of the Circuit Court of Appeals for the Third Circuit in *United Employees Association* v. *National Labor Relations Board*, 96 F. 2d 875, and with the plain meaning of the Act. As shown in our brief in *National Labor Relations Board* v. *International Brotherhood of Electrical Workers*, No. 253, this Term (set for argument with the instant case), Section 10 (f) applies only to the review of final orders entered in unfair labor practice cases under Section 10, and Section 9 (d) was affirmatively intended by Congress to preclude a review of representation proceedings under Section 9 except in the single situation when an order under Section 10 is based upon facts certified under Section 9.

A. That Section 10 (f) is limited to the review of orders issued by the Board under Section 10 appears from the separate headings and distinct subject matters of Sections 9 and 10, respectively, from the position of Section 10 (f) as an integral part of Section 10, from its express terms, especially its references to "order," "the unfair labor practice in question," and "the pleading," and from the absence of any mention in it of facts certified or certifications made under Section 9. In the instant

case, there is no order, no unfair labor practice, and no complaint. Even assuming that the Board's certification constitutes an order in the general sense of the term, it is not an "order" within the meaning of Section 10 (f). The only "order" which the Act authorizes the Board to make is an order issued pursuant to Section 10 (c). In Section 9 (d), where alone in the statute representation and unfair labor practice proceedings are mentioned in the same section, Congress drew a clear distinction between "facts certified" or "certification" under Section 9 and "order" under Section 10.

B. The Board's certification is not an order even in a general sense. The decision of the court below was put upon this ground. The Circuit Court of Appeals for the Third Circuit, in *United Employees Association* v. *National Labor Relations Board*, 96 F. (2d) 875, 876, likewise so held. These decisions are in accord with those of this Court in analogous cases (*Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 562; *Shannahan* v. *United States*, 303 U. S. 596, 599; *United States* v. *Atlanta, B. & C. R. Co.*, 282 U. S. 522, 527–528; *United States* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299, 309–310) and do not conflict with but are supported by the decision in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125. In the *Virginian Ry.* case, *supra*, the court declared that a certification of bargaining representatives by the National Mediation Board was not an order.

Proceedings under Section 9 (c) are investigatory in character and the Board's certification fulfilled merely an advisory function. Cf. *Shannahan* v. *United States, supra.* The certification had no legal effect upon the rights of the employers or employees or labor organizations involved. The Act imposes duties only upon employers (Section 8) and if the employers herein desired not to bargain with the certified representative, they could be compelled to do so only by a proceeding under Section 10 and no penalty could be imposed. In any such proceeding, there would be a hearing (Section 10 (b)) with opportunity for interested persons to intervene and to secure a judicial review if they were aggrieved by a final order of the Board, and the Board's findings in the certification proceeding would not be *res judicata.*

The decision in the *Rochester* case, *supra,* is clearly inapplicable. The determination of the commission there reviewed "necessarily and immediately carried direction of obedience to previously formulated mandatory orders" (307 U. S. at 144). No previous order had been made by the Board in this case, and it is governed by the principle of the decision in *Shannahan* v. *United States,* 303 U. S. 596.

C. Section 9 (d) of the Act in providing for a review of certifications only in connection with review of orders in unfair labor practice cases under

Section 10 was affirmatively intended by Congress to preclude any other review of certifications. This interpretation of Section 9 (d) is shown to be correct by the legislative history. S. Rept. No. 573, 74th Cong., 1st Sess., p. 15; H. Rept. No. 1147, 74th Cong., 1st Sess., p. 23; 79 Cong. Rec. 7658. Petitioners' contention that Congress intended Section 9 (d) to prohibit review only of representation proceedings prior to the holding of elections is inconsistent with the desire of Congress to avoid the delays which would be occasioned by any resort to the courts in representation proceedings. The same is true of their contention that Section 9 (d) was intended to be applicable primarily to employers and that Congress did not intend to limit appeals by labor organizations. Whether recent developments in the labor movement indicate that certifications should be reviewable by labor organizations, and whether the advantages of an amendment to achieve that purpose outweigh the disadvantages, are questions for Congress. The American Federation of Labor has proposed such an amendment (S. 1000, 76th Cong., 1st Sess.).

D. The foregoing interpretations of Sections 10 (f) and 9 (d) raise no substantial question of constitutionality. Even if it were assumed that Congress could not validly preclude all judicial review of certifications, Congress plainly was not required by the Constitution to confer jurisdiction

upon the court below or any other particular tribunal. Cf. *Shannahan* v. *United States*, 303 U. S. 596, and *Shields* v. *Utah Idaho Cent. R. Co.*, 305 U. S. 177. Thus the only possible question of constitutionality in this case arises from our interpretation of Section 9 (d) as precluding review.

The Board's certification did not forbid or compel any action, but even if it were assumed to have had an adverse legal effect upon rights of petitioners, the Fifth Amendment would not require that there be opportunity for judicial review. (Cases cited, *infra*, p. 40.) Petitioners' alleged right to represent the longshoremen in particular units in collective bargaining is not a constitutional right. Cf. *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515; *Blankenship* v. *Kurfman*, 96 F. (2d) 450, 454 (C. C. A. 7th).

Petitioners further contend that if Congress precluded review of certifications it unconstitutionally delegated judicial power to the Board. Section 9 (d) provides an opportunity for review whenever the Board issues an order based upon facts certified, and in the absence of such an order the Board's certification clearly could be made nonreviewable. See *Shields* v. *Utah Idaho Cent. R. Co.*, 305 U. S. 177, 180; *Pennsylvania Railroad Co.* v. *Labor Board*, 261 U. S. 72.

II

If the Act is held to grant jurisdiction to the court below to review the Board's certification, the Court may consider the merits, and, if it does so, it should affirm the certification. Petitioners have at no time challenged the validity of the Board's findings of fact and their petition for review goes solely to the question whether the Act empowers the Board to decide that a multiple-employer unit is appropriate for purposes of collective bargaining.

The Board's power under Section 9 (b) to determine that an "employer unit" is appropriate, taken in conjunction with the statutory definitions contained in Sections 2 (2) and (1), expressly authorizes it to decide upon units larger than the individual employer. *National Labor Relations Board* v. *Lund*, 103 F. (2d) 815 (C. C. A. 8). Moreover, the Board's power is supported in the instant case by the provisions of Section 9 (b) that the designated unit shall insure to employees the full benefit of their right to self-organization and shall effectuate the policies of the Act. To construe the Act to prohibit the Board from deciding that multiple-employer units are appropriate might seriously endanger commerce in many important industries, such as the coal, clothing, and maritime industries, in which collective agreements commonly are made between labor organizations and

groups or associations of employers on behalf of their members.

The Board's decision is supported also by the legislative history. An amendment of the House of Representatives which added to Section 9 (b) a proviso designed to limit the Board to units consisting of the employees of individual employers was stricken in conference and was not adopted by Congress.

Impartial studies show that there are many advantages which may be gained from bargaining collectively on a scale broader than the single employer. Multiple-employer units are especially appropriate where, as in the instant case, the employers bargain through associations, and where the employees may work for one employer one day and another the next. Labor organizations affiliated with the American Federation of Labor, a petitioner herein, have urged the Board to decide that such units were appropriate (*Matter of F. E. Booth & Co.*, 10 N. L. R. B. 1491; *Matter of Hyman-Michaels Co.*, 11 N. L. R. B. 796), and in 1934 the I. L. A., another petitioner herein, called a strike partly for the purposes of securing a coast-wide contract (R. 12). Petitioners' contention that the Board's discretion might "run riot," if the Board had power to decide in favor of multiple-employer units, hardly needs answer and is, in any event, contradicted by the Board's decisions thus far and by the principles which the Board has followed.

ARGUMENT

I

THE COURT BELOW HAD NO JURISDICTION TO REVIEW THE BOARD'S CERTIFICATION

Petitioners contend that the court below had jurisdiction under Section 10 (f) of the Act to review the Board's certification. They urge that the language of Section 10 (f) is sufficiently broad to permit a review of any final order, whether made in an investigation proceeding under Section 9 or in an unfair labor practice case under Section 10 (Br. 16–17); that the Board's certification is a final order (Br. 34–49); that Section 9 (d) does not preclude review herein (Br. 22–23, 20); and that, if the Act were construed not to provide for review, its constitutionality would be endangered (Br. 24–29).

The holding of the court below that it was without jurisdiction to review the certification is in accord with the decision of the Circuit Court of Appeals for the Third Circuit in *United Employees Association* v. *National Labor Relations Board*, 96 F. (2d) 875. See also *Wallach's, Inc.*, v. *Boland*, 277 N. Y. 345.

In our brief (pp. 15–23) in *National Labor Relations Board* v. *International Brotherhood of Electrical Workers*, No. 253, this Term (set for argument with the instant case), we demonstrate that Section 10 (f) applies only to the review of final orders entered in unfair labor practice cases under

Section 10; also that Section 9 (d), in providing for review of Board certifications under Section 9 only when an order under Section 10 is based upon "facts certified" under Section 9, was affirmatively intended by Congress to preclude any other review of investigation proceedings conducted under Section 9. Since the instant case involves these same questions, we respectfully refer the Court to our brief in that case to supplement the following answers to the contentions of the petitioners herein.

A. SECTION 10 (F) APPLIES ONLY TO THE REVIEW OF ORDERS ISSUED IN UNFAIR LABOR PRACTICE CASES UNDER SECTION 10

The absence of jurisdiction under Section 10 (f) in the instant case, as in the *International Brotherhood* case, will appear very plainly from a summary of the provisions of Sections 9 and 10. The provisions of each of these sections form a coherent whole distinct from the other.

Section 9 deals with and is headed "REPRESENTATIVES AND ELECTIONS." Subsection (a) declares that representatives designated for collective bargaining by a majority of the employees in a unit appropriate for that purpose shall be the exclusive representatives of all the employees in the unit. Subsection (b) directs the Board to determine the appropriate unit in accordance with certain standards hereinafter discussed (*infra*, pp. 43–45). Subsection (c) provides that, when a question affecting commerce arises concerning the representation of

employees, the Board may investigate (in which event it must provide for a hearing) and "certify" the name of the representative designated, and that it may take a secret ballot of employees or utilize any other suitable method to ascertain the representative. Subsection (d) provides that when "an order" of the Board in an unfair practice case under Section 10 is based upon "facts certified" in a representation investigation under Section 9, and enforcement or review of "such order" is sought pursuant to Section 10 (e) or (f), the decree of the court enforcing, modifying, or setting aside "the order" shall be entered upon a transcript including the "certification" and record of the investigation under Section 9. Thus, Section 9 authorizes the Board to certify the names of representatives but provides for a review only where the "facts certified" have a bearing upon the validity of "an order" issued in, and before the court for review in, an unfair labor practice case under Section 10. We show hereinafter (*infra*, pp. 31–38) that this provision for review of representation proceedings was intended to be exclusive.

Any contention that Section 10 (f) adds additional instances in which review of certifications may be had is met at the outset by the fact that Section 10 deals solely with and is headed "PREVENTION OF UNFAIR LABOR PRACTICES." Nowhere does it mention investigation proceedings or certifications under Section 9. Subsection (a) empowers the

Board to prevent any person from engaging in any unfair labor practice [listed in Section 8] affecting commerce. Subsection (b) provides that when a person is charged with engaging in any such unfair labor practice the Board may issue "a complaint stating the charges" and may hold a hearing, and that the person named in the complaint has the right to file "an answer." Subsection (c) directs the Board, if upon the testimony it is of the opinion that there has been any unfair labor practice, to state its findings of fact, and to issue "an order" to cease and desist and to take appropriate affirmative action; if it is of the opinion that there has been no unfair labor practice, it is directed to issue "an order" dismissing the complaint. Subsection (d) reserves to the Board authority to modify or set aside its findings or order until a transcript of the record shall have been filed in a court.

Subsection (e) permits the Board to petition any circuit court of appeals (and the Court of Appeals for the District of Columbia) in any circuit "wherein the unfair labor practice in question occurred or wherein such person resides or transacts business" for the enforcement of "such order," the court to obtain jurisdiction upon the filing of a transcript of the complete record, "including the pleadings and testimony upon which such order was entered" and the "order of the Board." The court is granted power to enter a de-

cree enforcing, modifying, or setting aside "the order" of the Board.

This brings us to subsection (f), which provides:

> (f) Any person aggrieved by a *final order* of the Board granting or denying in whole or in part the relief sought may obtain a review of *such order* in any circuit court of appeals of the United States in the circuit wherein *the unfair labor practice in question* was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the *order* of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including *the pleading* and testimony upon which *the order* complained of was entered and the findings and *order* of the Board. Upon such filing, *the court shall proceed in the same manner as in the case of an application by the Board under subsection* (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the *order* of the Board; and the findings of the Board as to the facts,

> if supported by evidence, shall in like manner be conclusive. [Italics supplied.]

Clearly the extent of this paragraph is simply to afford persons[5] aggrieved by final orders issued by the Board under Section 10 (c) the same right to have such orders reviewed and set aside as the Board is given by subsection (e) to have them enforced. See *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364, 369.

Petitioners, while admitting (Br. 18) that an investigation proceeding under Section 9 such as that involved here is of "an entirely different nature" from an unfair labor practice case under Section 10, nevertheless contend that the language "Any person aggrieved by a final order . . . may obtain a review . . ." is sufficiently broad to grant a review of the Board's certification. But this argument, even apart from the fact that the Board's certification was not an order (*infra*, pp. 24–31), ignores the context and other terms of the paragraph, as well as the excluding provisions of Section 9 (d). When these are considered, it becomes clear that even if the certification were assumed to constitute a final order in the ordinary sense, it was not an order within the meaning of Section 10 (e) or (f)—the "distinctive formulation of the conditions under which resort

[5] Contrary to the apparent belief of petitioners (Br. 16), we do not dispute that a labor organization may be a person aggrieved and thus be entitled to a review of an order issued under Section 10 (c).

to the courts may be made" under the Act. See *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156, 159. See also *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 132.

Section 10 (f) applies only to the review of orders entered in proceedings brought to prevent unfair labor practices, and not to the review of investigation proceedings (except as provided for by Section 9 (d)). Any other interpretation would be inconsistent with the separate title and subject matter of Section 10, with the position of subsection (f) as an integral part of Section 10, with its express terms, especially those which we have italicized, and with the meaning of Section 9 (d) (*infra*, pp. 31–38).

The references in Section 10 (f) to "order," "the unfair labor practice in question,"* and "the

* Petitioners argue (Br. 17) that the provision in Section 10 (f), for review in the circuit wherein "the unfair labor practice in question" was engaged in, does not indicate that only unfair labor practice cases were to be reviewed, because alternative venues for review are there also set forth—i. e., the circuit of residence or the Court of Appeals for the District of Columbia. But it is hardly to be supposed that Congress would provide that orders of the Board in unfair labor practice cases should be reviewable in forums not available for review of other types of Board orders (assuming there to be such). Rather the provision for review in the circuit where "the unfair labor practice in question was alleged to have been engaged in" shows that Congress had in mind only review in unfair labor practice cases. Otherwise it would have added to the last quoted words some such phraseology as "or in which the representation question arose."

pleading," and the absence of any mention of "facts certified" or "certification" or any other phrases drawn from Section 9 alone would compel the conclusion that Section 10 (f) was not intended to provide review of a proceeding like the instant, involving no "order," no unfair labor practice, and no complaint. The only authority which the Act confers upon the Board to issue an "order" is found in Section 10 (c). That the "order" reviewable under Section 10 (f) is this order and not a certification, even if a certification were assumed to be an order in the general sense, is indicated further by the careful use of terminology in Section 9 (d), where alone in the statute representation and unfair labor practice proceedings are mentioned in the same section. Congress there drew a clear distinction between "facts certified" and "certification" under Section 9, and "order" under Section 10.

B. THE BOARD'S CERTIFICATION IS NOT AN ORDER

Our discussion this far has assumed *arguendo* that the Board's certification is an order, although not an "order" within the particular meaning of Section 10 (f) or any other provision of the Act. We now show that the Board's certification is not an order at all and hence that Section 10 (f), even if it were not limited to unfair labor practice cases under Section 10, could not be applicable herein as contended by petitioners. The

holding of the court below was put upon this ground (R. 74). The Circuit Court of Appeals for the Third Circuit likewise so held in *United Employees Ass'n* v. *National Labor Relations Board*, 96 F. 2d 875, 876.[7] These decisions are in accord with those of this Court in analogous cases (*Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 562; *Shannahan* v. *United States*, 303 U. S. 596, 599; *United States* v. *Atlanta, B. & C. R. Co.*, 282 U. S. 522, 527–528; *United States* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299, 309–310), and, contrary to the claim of petitioners (Br. 45–49), do not conflict with, but are supported by, the principles discussed in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125.

The *Virginian Railway* case, *supra*, arose under the Railway Labor Act (c. 347, 44 Stat. 577), as amended (c. 691, 48 Stat. 1185), and particularly Section 2, ninth, thereof, which imposes a duty upon the employer to treat with the certified representative of the employees upon receipt of the certification of the National Mediation Board. In it the Court said (300 U. S. at 562):

> The National Mediation Board makes no order. The command which the decree of the court enforces is that of the statute, not

[7] In the *International Brotherhood* case, relied on by petitioners (Br. 31–33) the Circuit Court of Appeals for the Sixth Circuit said that a "certificate is not an order" (105 F. 2d 598, 601).

> of the Board. Its certificate that the Federation is the authorized representative of the employees is the ultimate finding of fact prerequisite to enforcement by the courts of the command of the statute. There is no contention that this finding is conclusive in the absence of a finding of the basic facts on which it rests—that is to say, the number of eligible voters, the number participating in the election and the choice of the majority of those who participate. Whether the certification, if made as to those facts, is conclusive, it is unnecessary now to determine.

Under the National Labor Relations Act, an employer's duty under Section 8 (5), that he not refuse to bargain with the representative of a majority of his employees in the appropriate unit, is not contingent upon the receipt or existence of a certification under Section 9 (c); the duty may be enforced only by a proceeding against the employer pursuant to Section 10; and such a proceeding may be instituted by the Board regardless of whether or not there has been a certification (Sections 10 and 8 (5)). See e. g., *Remington Rand* v. *National Labor Relations Board*, 94 F. 2d 862 (C. C. A. 2d), certiorari denied, 304 U. S. 576, 585; *Carlisle Lumber Co.* v. *National Labor Relations Board*, 94 F. 2d 138, certiorari denied, 304 U. S. 575; *National Labor Relations Board* v. *Louisville Refining Co.*, 102 F. 2d 678 (C. C. A. 6th),

certiorari denied, October 9, 1939. *A fortiori*, therefore, if the certification in the *Virginian Railway* case was not an order, the Board's certification in the instant case is not.

The proceeding herein was investigatory in character, as are all proceedings under Section 9 (c). The Board's certification fulfilled merely an advisory function (Cf. *Shannahan* v. *United States*, 303 U. S. 596, 599) and had no legal effect upon the rights of the employers or employees or labor organizations involved. The Act imposes duties only upon employers (Section 8), and if the employers herein desired not to recognize the I. L. W. U. as the exclusive representative, they could refuse in the same manner as they did prior to the Board's certification and at the risk of no penalty. They could be compelled only by court enforcement of an order made in a proceeding against them under Section 10. In any such case there would be a hearing (Section 10 (b)) with opportunity for interested persons and labor organizations to intervene pursuant to the Act (Section 10 (b)) and to the Board's Rules and Regulations (Series 2, Art. II, Sec. 19) and, if they were aggrieved by a final order, to secure a review under Section 10 (f) before such order could be enforced. The Board's findings in the certification proceeding would not be *res judicata* (Cf. *In the Matter of American-Hawaiian S. S. Co.*, 6 N. L. R. B. 678; *In the Matter of Fedders Mfg. Co.*, 7 N. L. R. B. 817), and even if the Board should refuse to recon-

sider matters fully investigated under Section 9 (c), such matters, including any questions as to the appropriate unit, would be a part of the record before the court for judicial review as provided in Section 9 (d).

For these reasons we submit that the Board's certification is not an order. It can be construed, at most, only as an announcement that the Board probably would entertain a charge under Section 10 against the employers if, after a request (See *National Labor Relations Board* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292), they refused to bargain exclusively with the certified representative, and that it would probably not proceed against them if they did so bargain. Cf. *United States* v. *Atlanta, B. & C. R. Co.*, 282 U. S. 522; *Shannahan* v. *United States*, 303 U. S. 596, 599. Since the Act imposes no penalties, it may not be said that such an announcement adds any compulsion to the employers' duty under Section 8 (5). Cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. And, at least as regards the employers, even if the certification could be called an order, it would not be a "final order" as required by Section 10 (f), but concededly (Br. 44, 22–23) would fall within the category of nonreviewable orders discussed in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 129, 130–131, wherein "the order sought to be reviewed does not of itself adversely affect complainant but only affects his

rights adversely on the contingency of future administrative action."

Petitioners contend (Br. 45), however, that the instant case belongs with the third group of cases discussed in the opinion in the *Rochester* case (307 U. S. at 130, 135–143), wherein "the action sought to be reviewed does not forbid or compel conduct on the part of the person seeking review but is attacked because it does not forbid or compel conduct by a third person." The ground of this contention apparently is that the Board did not compel the employers to bargain with the representatives of the employers in individual employer units. But it has already been shown that a certification is without legal effect, and that only by a proceeding under Section 10 could the Board order the employers to bargain. Since the Board has made no order under Section 10, the instant case is clearly distinguishable from the decision in the *Rochester* case. The determination of the Commission there reviewed "necessarily and immediately carried direction of obedience to previously formulated mandatory orders" (307 U. S. at 144). In the absence of any such order by the administrative tribunal, its determination in regard to the particular status of a party under the statute is not reviewable except by suit in equity, and then only if the statute does not preclude such a suit

and if the conditions of equity jurisdiction can be met. *Shannahan* v. *United States*, 303 U. S. 596; *Shields* v. *Utah Idaho Cent. R. Co.*, 305 U. S. 177. Thus in the *Shannahan* case the Court held that the Interstate Commerce Commission's decision and certification that a carrier was not an interurban electric railway and hence that it was subject to the Railway Labor Act, was not a reviewable order under the Urgent Deficiencies Act. The *Shannahan* decision was not overruled by the decision in the *Rochester* case, which cites it with approval (307 U. S. at 130), and we submit that the principle upon which that decision was based is controlling here.

Petitioners contend (Br. 25–26, 40) that the Board's certification has adversely affected the property rights of employees to self-organization, has deprived petitioners of their status as bargaining representative, and has, in effect, put them "out of business" in regard to the Pacific Coast longshoremen. To support this contention they state (Br. 4, 23, 40) that the employers have entered into contracts with the I. L. W. U. as the exclusive representative of the longshoremen and have agreed to give preference of employment to members of that organization. But that is immaterial to the question whether the certification is an order or had any legal effect. For it is fallacious to conclude that because these events followed the Board's certification, they were compelled by it.

The employers might have taken the same action in the absence of any certification. Indeed, prior to the certification, as the Board found (R. 26), the employers (except in four ports) gave preference of employment to members of the I. L. W. U., the agreement of 1937 negotiated by the I. L. A., under which preference of employment was to be given its members (R. 14), having been taken over by the I. L. W. U. after the longshoremen had voted to change their allegiance to that organization (*supra*, p. 6).

C. SECTION 9 (D) PRECLUDES REVIEW OF THE BOARD'S CERTIFICATION

Thus far we have shown that Section 10 (f) is limited to the review of final orders issued in unfair labor practice cases under Section 10, and that, in any event, the Board's certification was not such an order or, indeed, an order at all. We now show that Section 9 (d), properly interpreted according to the affirmative intent of Congress, precludes a review herein by enacting, in effect, that certifications are reviewable only in connection with the review of orders under Section 10. Section 9 (d) provides:

> Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such

> certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

In thus making certifications reviewable in a single situation, and providing for their review in no other case, Congress intended that no other review of them should be permitted. This is the natural construction of the provision and its correctness is shown conclusively by the legislative history. Since we have treated the legislative history at length in our brief (pp. 25–32) in the *International Brotherhood* case, we will refer here only to such portions as are particularly in point in this case.

The Reports both of the Senate and House Committees interpret Section 9 (d) as precluding review of investigation proceedings except as there provided. The Senate Committee Report (S. Rept. No. 573, 74th Cong., 1st Sess., p. 14), after noting the requirement of Section 9 (c) that in any such proceeding a hearing must be held, declares:

> Section 9 (d) makes it absolutely clear that there shall be no right to court review anterior to the holding of an election. An election is the mere determination of a

> preliminary fact, and in itself has no substantial effect upon the rights of either employers or employees. * * * But if subsequently the Board makes an order predicated upon the election, such as an order to bargain collectively with elected representatives,* then the entire election procedure becomes part of the record upon which the order of the Board is based, and is fully reviewable by any aggrieved party in the Federal courts in the manner provided in section 10. And this review would include within its scope the action of the Board in determining the appropriate unit for purposes of the election. This provides a complete guarantee against arbitrary action by the Board.

The House Committee Report (H. Rept. No. 1147, 74th Cong., 1st Sess., p. 23) similarly states:

> As previously stated in this report, the efficacy of Public Resolution 44 has been substantially impaired by the provision for court review of election orders prior to the holding of the election. Section 9 (d) of the bill makes clear that there is to be no court review prior to the holding of the election, and provides an *exclusive*, complete, and adequate remedy whenever an order of the Board made pursuant to section

* Another type of Section 10 order based in part upon facts certified under Section 9 would be one directing the employer to cease and desist from bargaining with an organization other than the majority representative.

> 10 (c) is based in whole or in part upon facts certified following an election or other investigation pursuant to section 9 (c). The hearing required to be held in any such investigation provides an appropriate safeguard and opportunity to be heard. [Italics supplied.]

Petitioners contend (Br. 20–21) that these reports go to show that Congress was concerned only with prohibiting appeals prior to the holding of elections, and did not intend to foreclose review of certifications after elections. We agree that such appeals may have been foremost in the mind of Congress, because of the experience under Public Resolution 44.* But this is far from saying that Congress did not intend also to preclude review of certifications, and the reports construe Section 9 (d) as excluding all review of representation proceedings except as therein provided. Moreover, if the provision excludes review prior to elections it is exclusive in regard to any review; in the absence of any language warranting a distinction it cannot be construed as exclusive for one purpose and as not exclusive for another. Petitioners' in-

* The unsatisfactory experience under Public Resolution 44 (approved June 19, 1934, c. 677, 48 Stat. 1183), which, with Section 7 (a) of the National Industrial Recovery Act (Act of June 16, 1933, c. 90, 48 Stat. 195, 15 U. S. C., Secs. 701 *et seq.*), was the predecessor of the National Labor Relations Act, is discussed in the Committee Reports (H. Rept. 1147, 74th Cong., 1st Sess., pp. 6–7; S. Rept. 573, 74th Cong., 1st Sess., pp. 5–6) and in our brief (pp. 24–32) in the *International Brotherhood* case.

terpretation is illogical and, in addition, it is opposed by the statement of Senator Walsh, Chairman of the Senate Committee, made on the floor of the Senate (79 Cong. Rec. 7658), as follows:

> Mr. COUZENS. The Senator said that Resolution 44 was ineffective. Will he tell us before he concludes why Resolution 44 was ineffective?
>
> Mr. WALSH. It was ineffective, as I think I stated, because of appeals to the courts. In cases where attempts have been made to hold elections the claim has been made that the Board had no legal authority; the cases have been brought into court, and they are in the courts and undecided.
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> * * * * * *
>
> Mr. COUZENS. Would the passage of the pending bill remove the appeals to the courts?
>
> Mr. WALSH. Yes; it would because *it limits appeals.* It provides for review in the courts *only after* the election has been held and *the Board has ordered the employer to do something* predicated upon the results of the election. [Italics supplied.]

Further reason for rejecting petitioners' interpretation is that review of certifications would be subject to the same objection which was a reason for prohibiting review of proceedings prior to the holding of elections, which petitioners apparently admit that Congress did prohibit (Br. 20). This objection was that such review would result in de-

lays in preventing employers from engaging in unfair labor practices (H. Rept. 1147, 74th Cong., 1st Sess., pp. 6–7, 23; S. Rept. 573, 74th Cong., 1st Sess., pp. 5–6). If certifications were reviewable, it would be possible, just as in the case of directions of hearings or elections, for employers or competing labor organizations or even, perhaps, for individual employees, by filing appeals and applications for stays, to prevent the Board from proceeding under Section 10 pending final decision as to the validity of the certification.[10] And by or before such final decision it might well be that, due to the employer's continued violations of the Act or some other reason, the certified representative would have lost its majority or that a further investigation under Section 9 would be required. Thus the collective bargaining provision of the Act (Section 8 (5)) might be rendered inoperative.

We submit, therefore, that Congress, in precluding a review of certifications except as specified in Section 9 (d), wisely acted upon " 'the policy that the greater good is sometimes served by making certain classes of decisions final and ending litigation, even though in a particular case the individual is prevented by review from correcting some error which has injured him'." *Crane* v. *Hahlo*, 258 U. S. 142, 148.

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[10] During the year covered by the Board's most recent annual report (June 1937–June 1938), a total of 342 certifications were issued. *Third Annual Report of the National Labor Relations Board*, p. 40.

As a reason for construing Section 9 (d) not to bar review of certifications, although construed to bar review of proceedings prior to the holding of elections, petitioners urge (Br. 21–22), that the Board's determination of the appropriate bargaining unit is judicial in nature whereas, they assert (Br. 21), "No such exercise of discretion or determination of policy is involved in the conduct of an election." The fact is, however, that before holding elections the Board does and must decide what constitutes the appropriate unit. Otherwise, the election would not be accurate since the unit fixes the eligibility to vote. It cannot be asserted that Congress did not anticipate the necessity of determining the unit prior to the election; the Senate Committee Report speaks of "the action of the Board in determining the appropriate unit *for purposes of the election*" (S. Rept. No. 573, 74th Cong., 1st Sess., p. 14). [Italics supplied.]

Finally, petitioners urge (Br. 22–23) that Section 9 (d) was intended to be applicable "primarily" to employers, and that Congress did not intend it to limit review by labor organizations, especially since a review by way of a proceeding under Section 10 might not be open to the latter. A similar contention is answered in our brief (pp. 31–32) in the *International Brotherhood* case. We there point out that delays occasioned by appeals in representation proceedings would be objectionable regardless of who took the appeals and that Congress meant to preclude those brought by

labor organizations or individual employees as well as those brought by employers.[11] We also stated that whatever may have been the dominant motive of Congress in enacting Section 9 (d), the Court cannot interpret it differently according to whether an employer or a labor organization seeks review. If recent developments in the labor movement, or any other considerations, are persuasive that certifications should be reviewable at the instance of labor organizations, it is for Congress to reconsider the subject, as it is now doing, and prescribe the method and terms to govern such review. There is now pending before Congress a bill (S. 1000, 76th Cong., 1st Sess.) sponsored by the American Federation of Labor which would amend Section 9 (d) to provide that "In any proceeding under Section 9 which is not incidental to a proceeding under Section 10, certification or denial thereof * * * shall constitute a final order and shall be reviewable upon the petition of any labor organization aggrieved * * *"

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[11] The Senate Committte Report, in the portion quoted, *supra*, pp. 32–33, stated, as a reason for the exclusive interpretation of Section 9 (d), that "An election is the mere determination of a preliminary fact, and in itself has no substantial effect upon the rights of *either employers or employees*." (Italics supplied.) That Congress must have contemplated the possibility of appeals by labor organizations is further indicated by the statement of the House Committee (H. Rept. No. 1147, 74th Cong., 1st Sess., p. 22) that questions of representation would "ordinarily arise as between two or more bona fide organizations competing to represent the employees."

D. THE FOREGOING INTERPRETATIONS OF SECTIONS 10 (F) AND 9 (D) DO NOT ENDANGER THE CONSTITUTIONALITY OF THE ACT

Petitioners contend in their brief (pp. 24–29), although they did not do so in their petition for certiorari, that the constitutionality of the Act would be endangered if the Board's interpretation of Section 10 (f) were correct, and that, therefore, if the Court finds the terms of Section 10 (f) to be ambiguous, it should reject the Board's interpretation. Their argument is that the Board's certification of the I. L. W. U. was a judicial determination which adversely affected the property right of petitioners to represent the longshoremen in collective bargaining, that the due process clause of the Fifth Amendment requires that there be a judicial review of such a determination, and that, if the Act were construed to preclude such a review, it would be invalid as an unconstitutional delegation of judicial power to the Board.

Even if it were assumed that Congress could not validly preclude all judicial review of the Board's certification, Congress plainly was not required by the Constitution to confer jurisdiction upon the Court of Appeals for the District of Columbia or any other particular tribunal. Cf. *Shannahan* v. *United States*, 303 U. S. 596, and *Shields* v. *Utah Idaho Cent. R. Co.*, 305 U. S. 177. Accordingly, the only possible application which petitioners' claim could have would be in regard to our contention (*supra*, pp. 31–38) that Section 9 (d) should be

construed to exclude review by any court except as therein provided. It has no application to the validity of our interpretation of Section 10 (f), which is the provision relied on by petitioners.

However, it has already been shown (*supra*, pp. 24–31) that the Board's certification is not an order and did not forbid or compel any action on the part either of the employers or petitioners. Consequently, the certification cannot be said to have deprived petitioners of any property or other rights. Moreover, the alleged right asserted by petitioners to bargain for longshoremen in particular units is a statutory as distinct from a constitutional right. Cf. *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515; *Blankenship* v. *Kurfman*, 96 F. 2d 450, 454 (C. C. A. 7th). Hence, even if it were assumed that the Board's certification had an adverse effect upon rights of petitioners, the Fifth Amendment would not require that there be opportunity for a judicial review. *Reetz* v. *Michigan*, 188 U. S. 505, 507; *United States* v. *Ju Toy*, 198 U. S. 253; *Passavant* v. *United States*, 148 U. S. 214, 219, 222. See also *United States* v. *Babcock*, 250 U. S. 328; *Crane* v. *Hahlo*, 258 U. S. 142; *Work* v. *Rives*, 267 U. S. 175; *First Moon* v. *White Tail*, 270 U. S. 243; *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551; *Butte, Anaconda & Pacific Ry. Co.* v. *United States*, 290 U. S. 127, and other cases collected in the concurring opinion in *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 77–81.

The fact that the Board's authority to issue certifications under Section 9 (c) or to issue complaints under Section 10 is discretionary rather than mandatory is an additional reason why the Constitution does not require opportunity for judicial review. Cf. *Dismuke* v. *United States*, 297 U. S. 167, 172; *Newport Electric Corp.* v. *Federal Power Commission*, 97 F. (2d) 580, 582 (C. C. A. 2d). The decisions relied on by petitioners (Br. 27)[12] are not in point since, so far as they are relevant at all, they relate merely to the scope of judicial review of orders which affect property interests held to be protected by the Constitution. Compare *Acker* v. *United States*, 298 U. S. 426, 434.

Petitioners' contention (Br. 27) that if Congress precluded review of certifications it unconstitutionally delegated judicial power to the Board, is answered by the fact that Section 9 (d) provides for review whenever the Board issues an order based upon facts certified. In the absence of such an order, the Board did not exercise any such judicial function as could not be made conclusive. See *Shields v. Utah Idaho R. Co.*, 305 U. S. 177, 180; *Pennsylvania Railroad Co.* v. *Labor Board*, 261 U. S. 72.

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[12] *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285; *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287; *Crowell* v. *Benson*, 285 U. S. 22; *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38.

II

THE ACT AUTHORIZED THE BOARD TO DECIDE THAT THE APPROPRIATE UNIT FOR COLLECTIVE BARGAINING COMPRISED THE LONGSHOREMEN EMPLOYED BY THE MEMBERS OF THE EMPLOYERS' ASSOCIATIONS

Petitioners argue the merits only briefly (Br. 9–12) and the validity of the Board's certification was not passed upon by the court below, since it held that it was without jurisdiction to review the proceeding. However, while we think that this holding should be sustained on the grounds already stated (*supra*, pp. 17–41), if the Court holds to the contrary, it may care to consider the merits, and, if it does so, we submit that it should affirm the Board's certification.

Petitioners have at no time challenged the validity of the Board's findings of fact, but contend that the Board has no power under the Act to decide that an appropriate bargaining unit may include the employees of more than a single employer (Br. 5, 48), which is purely a question of statutory construction. This contention was rejected by the Board (R. 28–29, 7 N. L. R. B. 1002, 1024–1025) and is contrary to the decision of the Circuit Court of Appeals for the Eighth Circuit in *National Labor Relations Board* v. *Lund*, 103 F. (2d) 815.

The decision of the Board that the Act authorized it to determine that the appropriate unit consisted of the longshoremen employed by the mem-

bers of the employers' associations was based upon and is valid under the provisions of Section 9 (b), taken in conjunction with the statutory definitions contained in Section 2 (1) and (2). Section 9 (b) provides:

> The Board shall decide in each case whether, in order to insure to employees [13] the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the *employer* unit, craft unit, plant unit, or subdivision thereof. [Italics supplied.]

The term "employer," as used in the Act, includes "any person acting in the interest of an employer" (Section 2 (2)), and the term "person" is defined to include "one or more * * * associations" (Section 2 (1)). It appears, therefore, that the Board had express power to find that the appropriate "employer unit" in this case was coextensive with the employers' associations which since 1934 had acted in behalf of their members in bargaining with the longshoremen (*supra*, pp. 5–6).

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[13] The Act provides that the term "employee," except where otherwise explicitly stated, "shall not be limited to the employees of a particular employer" (Section 2 (3)). The report of the Senate Committee (S. Rept. No. 573, 74th Cong., 1st Sess., p. 6) indicates that one reason for this provision was that some labor organizations bargained with associations of employers.

If, contrary to the literal meaning of the foregoing provisions, the Board's power were limited in the manner contended by petitioners, the Board could not recognize the propriety of established multiple-employer units which had evolved in bargaining between unions and groups or associations of employers in many important industries,[14] as Congress undoubtedly knew (footnote 13, *supra*, p. 43). Such a consequence would, in such case, be inconsistent with the provision of Section 9 (b) that the appropriate unit designated by the Board shall insure to employees "the full benefit of their right to self-organization" and shall effectuate the

[14] Some 37 trades or industries in which employers' associations engage in collective bargaining are listed in United States Department of Labor, Bureau of Labor Statistics, *Collective Bargaining with Employers' Associations*, Monthly Labor Review, 1939, Vol. 49, No. 2, p. 310. Among the most noteworthy examples, in addition to coal mining (footnote 15, *infra*, p. 46), are the clothing, building, printing, glass, transportation, and maritime industries. See Zaretz, C. E., *The Amalgamated Clothing Workers of America*, 1934, pp. 174–219; United States Department of Labor, Bureau of Labor Statistics, *Union-Management Relations, Women's Clothing*, Monthly Labor Review, 1936, Vol. 43, No. 1, pp. 24–33; United States Department of Labor, Bureau of Labor Statistics, Bulletin 481, 1928, pp. 83–103; United States Department of Labor, Bureau of Labor Statistics, *Collective Bargaining in the Glass Industry*, Monthly Labor Review, 1936, Vol. 42, No. 5, p. 1204; *Third Annual Report of the National Mediation Board*, 1937, pp. 2–3; United States Department of Labor, Bureau of Labor Statistics, *Industrial Relations in 1938*, Monthly Labor Review, 1939, Vol. 48, No. 3, p. 506.

policies of the Act, which are to protect commerce by eliminating the causes of industrial strife (Section 1). The Board would be called upon to issue certifications and orders in conflict with existing practices of collective bargaining which are satisfactory to the employers and to the majority of the employees involved. Minority groups or individuals would seek to have the Board order employers to cease giving effect to existing beneficial contracts and not to renew them. Uniformity and stability in employment relations would give way to uncertainty and strikes resulting in severe obstructions to commerce. The possibility of a widespread strike by the Pacific Coast longshoremen in particular, may not be overlooked in view of the 1934 strike called by the members of the I. L. A. partly for the purpose of obtaining a coast-wide contract (*supra*, pp. 4–5).

Petitioners' contention as to the limited scope of the Board's authority under Section 9 (b) is opposed further by the legislative history, which indicates that Congress did not intend to restrict the Board in the manner asserted. The bill as originally introduced and as passed by the Senate authorized the Board to determine that the appropriate unit was the "employer unit, craft unit, plant unit, or other unit" (S. 1958, 74th Cong., 1st Sess., Section 9 (b)). On the floor of the House of Representatives this provision was amended by

striking out the words "or other unit" and adding "*Provided that* no unit shall include the employees of more than one employer" (79 Cong. Rec. 9728). The addition of this proviso was opposed by Representative Connery, sponsor of the bill in the House and Chairman of the House committee, as follows (79 Cong. Rec. 9728):

> According to the amendment offered by the gentleman from Georgia, the United Mine Workers would have to deal with each separate one [coal operator], and they could not unite for collective bargaining as a unit in the coal industry.[15]

In view of this pertinent objection, the subsequent action of Congress in adopting the Conference Report of the House and Senate Committee (79 Cong. Rec. 10259, 10298) which omitted both the proviso of the House amendment and the words "or other unit" which had been in the bill as it

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[15] The terms and conditions of employment in most of the bituminous coal industry were and are covered by basic agreements between the United Mine Workers and associations of coal operators. See United States Department of Labor, Bureau of Labor Statistics, *Bituminous Coal Stoppage 1939*, Monthly Labor Review, 1939, Vol. 49, pp. 691–703. See also *Matter of Alston Coal Co.*, 13 N. L. R. B., No. 77; Dennison, Hotchkiss, and Willits, *Labor Relations in the Anthracite Industry* (annexed to the Report of the United States Coal Commission, 1929, pp. 96–100); United States Department of Labor, Bureau of Labor Statistics, *The 1936 Anthracite Agreement*, Monthly Labor Review, 1936, Vol. 42, pp. 1581–1582.

passed the Senate, may well indicate an intent to permit the Board to decide upon units larger than the single employer, at least where, as here and in the coal and other industries (footnote 14, *supra*, p. 44), such multiple-employer units accord with existing bargaining practice. This inference is consistent with the statement of the managers on the part of the House (79 Cong. Rec. 10299) and of the Chairman of the Senate Committee (79 Cong. Rec. 10259) that the proviso stricken in conference "was subject to some misconstructions."[16]

Even if it were possible to uphold petitioners' contention, we submit that such a decision would be undesirable. Impartial studies of labor relations both in this country and abroad, especially in Great Britain and Sweden, suggest that there are many advantages which may be gained from collective

[16] The full statement, insofar as pertinent herein, reads as follows:

"The amendment also added a proviso designed to limit the otherwise broad connotation that might be put upon the phrase 'or other unit.' The proviso, however, was subject to some misconstructions, and the conferees have agreed that the simplest way to deal with the matter is to strike out the undefined phrase 'other unit.' It was also agreed to insert after 'plant unit' the phrase 'or subdivision thereof.' This was done because the National Labor Relations Board has frequently had occasion to order an election in a unit not as broad as 'employer unit', yet not necessarily coincident with the phrases 'craft unit' or 'plant unit'; for example, the 'production and maintenance employees' of a given plant."

bargaining on a scale broader than with single employers.[17] These advantages would appear to be especially clear in situations such as that presented herein where the employers function through associations and where the nature of the employment is such that the employees, dispatched from jointly operated hiring halls, may work one day for one employer and the next day for another.[18] The Act ought not to be construed to interfere with the continuation and further development of multiple-employer units in these and similar instances.

Petitioners assert (Br. 9) that the American Federation of Labor is seriously disturbed over the "tremendous implications" of this case. They cite (Br. 9–11) several hypothetical instances in an endeavor to impress the Court that the Board's discretion might "run riot" if multiple-employer units were permitted. To the extent that this argument requires answer, it may be noted, however, that in other cases[19] labor organi-

[17] Commission on Industrial Relations, *Final Report and Testimony*, 1916, Vol. I, pp. 119–120; *Report of the United States Coal Commission*, 1925, pp. 275–276; United States *Report of the Commission on Industrial Relations in Great Britain and Sweden*, 1938. See also Riesenfeld, S. A., *Recent Developments of French Labor Law* (1939), 23 Minnesota Law Review, 407, 430.

[18] This turn-over of employment might even involve a variation of collective bargaining representatives from day to day, if the employees of each employer were considered to be separate units.

[19] *Matter of F. E. Booth & Co.*, 10 N. L. R. B. 1491; *Matter of Hyman-Michaels Co.*, 11 N. L. R. B. 796. See also

zations affiliated with the American Federation of Labor have urged the Board to decide that such units were appropriate and that, indeed, in the case of the Pacific coast longshoremen, the I. L. A. went on strike partly for the purpose of securing a coast-wide agreement (*supra*, p. 5). Moreover, petitioners are able to cite no case in which the Board has abused its discretion in finding such a unit appropriate. Except in cases involving companies affiliated by common ownership or control,[20] the Board has never decided in favor of multiple employer bargaining unless there had been, as here, a previous history of actual dealing upon that basis and unless adequate machinery for it already existed.[21] In the absence of these conditions the Board has rejected contentions that multiple-employer units were appropriate. E. g. *Matter of Aluminum Line*, 8 N. L. R. B. 1325; *Matter of F. E. Booth & Co.*, 10 N. L. R. B. 1491

Matter of C. A. Lund Co., 6 N. L. R. B. 423, order enforced *National Labor Relations Board* v. *Lund*, 103 F. (2d) 815 (C. C. A. 8); *Matter of Union Premier Food Stores, Inc.*, 10 N. L. R. B. 370, 11 N. L. R. B. 270.

[20] E. g., *Matter of C. A. Lund Co.*, 6 N. L. R. B. 423, order enforced *National Labor Relations Board* v. *Lund*, 103 F. (2d) 815 (C. C. A. 8); *Matter of Art Crayon Co.*, 7 N. L. R. B. 102; *Matter of Mackay Radio Corp.*, 5 N. L. R. B. 657; *Matter of Postal Telegraph-Cable Corp.*, 9 N. L. R. B. 1060.

[21] See *Matter of Mobile Steamship Association*, 8 N. L. R. B. 1297; *Matter of Admiar Rubber Co.*, 9 N. L. R. B. 407; *Matter of Monon Stone Co.*, 10 N. L. R. B. 64; *Matter of Hyman-Michaels Co.*, 11 N. L. R. B. 796; *Matter of Alston Coal Co.*, 13 N. L. R. B., No. 77.

For the above reasons, and since it is not contended that the Board's determination herein was arbitrary or in any respect unreasonable, as it clearly was not, we submit that if the Court holds that the Act authorizes a review, it should sustain the certification.

CONCLUSION

It is submitted that the decision of the court below dismissing the petition for review for lack of jurisdiction was correct and should be affirmed. In the event that the Act is held to grant jurisdiction to review the proceedings before the Board, it is submitted that the Court, if it passes upon them, should sustain the decision and certification of representatives issued by the Board.

Respectfully submitted.

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NOVEMBER 1939.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. Supp. IV, Sec. 152, 159, 160) are as follows:

SEC. 2. When used in this Act—

(1) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain [1] such representatives.

[1] So in original.

(d) Whenever an order of the Board made pursuant to section 10 (c), is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such com-

plaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging

in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing,

modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing,

modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101–115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

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SUPREME COURT OF THE UNITED STATES.

No. 70.—October Term, 1939.

American Federation of Labor, International Longshoremen's Association and Pacific Coast District International Longshoremen's Association No. 38, Petitioners,
vs.
National Labor Relations Board.

On Writ of Certiorari to the United States Circuit Court of Appeals for the District of Columbia.

[January 2, 1940.]

Mr. Justice Stone delivered the opinion of the Court.

The question decisive of this case is whether a certification by the National Labor Relations Board under § 9(c) of the Wagner Act, 49 Stat. 449, 453, 29 U. S. C., Supp. IV, §§ 151-166, that a particular labor organization of longshore workers is the collective bargaining representative of the employees in a designated unit, composed of numerous employers of longshore workers at Pacific Coast ports, is reviewable by the Court of Appeals for the District of Columbia by the procedure set up in § 10(f) of the Act.

Petitioners, International Longshoremen's Association, and its affiliate, Pacific Coast District International Longshoremen's Association No. 38, are labor organizations, both affiliated with the petitioner, American Federation of Labor (A. F. of L.). In January, 1938, the International Longshoremen's & Warehousemen's Union, District No. 1, a labor organization affiliated with the Congress of Industrial Organization (C.I.O.) petitioned the Board for an investigation concerning the representation of longshoremen on the Pacific Coast, and that the Board certify the name of the appropriate representative for collective bargaining as provided in § 9(c) of the Wagner Act.

The Board directed an investigation with appropriate hearings, and a consolidation of the proceeding for purposes of hearing with two other proceedings already initiated by locals of the Long-

shoremen's Union. Petitioners were made parties to the consolidated proceedings and participated in the hearings, at the conclusion of which the Board made its findings of fact and of law and certified that the workers who do longshore work in the Pacific Coast ports for the employers which are members of five designated employer associations of Pacific Coast shipowners or of waterfront employers, constitute a unit appropriate for the purposes of collective bargaining within the meaning of § 9(b) of the Act. It also certified that the C. I. O. affiliate, Longshoremen's Union, District No. 1, is the exclusive bargaining representative of all the workers in such unit within the meaning of the Act. *In the Matter of Shipowners' Association of the Pacific Coast, et al.*, 7 N. L. R. B. 1002.

The effect of the certification, as petitioner alleges, is the inclusion in a single unit, for bargaining purposes, of all of the longshore employees of the members of the employer associations doing business at the west coast ports of the United States, and to designate the C.I.O. affiliate as their bargaining representative so that in the case of some particular employers, their workers who are not organized or represented by the C.I.O. affiliate have been deprived of opportunity to secure bargaining representatives of their own choice. Although the petitioners who are affiliated with the A. F. of L. assert that they have in fact been selected as bargaining representatives by a majority of the employees of their respective employers, petitioners allege that they have nevertheless been prevented from acting in that capacity by the Board's designation of the C. I. O. affiliate as the exclusive representative of such employees.

The present suit was begun by petition to the Court of Appeals of the District of Columbia in which the petitioners set forth, in addition to the facts already detailed, that they were aggrieved by the "decision and order of certification of the Board" in that the certificate is contrary to fact and to law; that the Wagner Act does not contemplate or authorize "the designation by the Board of an employee unit constituting all the employees of different employers in different and distant geographical districts of the United States." The petition prayed that the "order of certification" be set aside, in so far as it attempts to designate a single exclusive bargaining representative for longshore employees of many employers on the Pacific Coast and denies to a majority of the longshore employees of a single employer the right to select one of the petitioners as their exclusive bargaining representative.

The Court of Appeals dismissed the petition as not within the jurisdiction to review orders of the Board conferred upon it by § 10 of the Wagner Act. 103 F. (2d) 933. We granted certiorari October 9, 1939, because of the importance of the question presented and to resolve an alleged conflict of the decision below with that of the Court of Appeals for the Sixth Circuit, in *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 105 F. (2d) 598.

The Court of Appeals for the District of Columbia, like the several circuit courts of appeals, is without the jurisdiction over original suits conferred on district courts by § 24 of the Judicial Code, as amended. 28 U. S. C., § 41. Such jurisdiction as it has, to review directly the action of administrative agencies, is specially conferred by legislation relating specifically to the determinations of such agencies made subject to review, and prescribing the manner and extent of the review. Here, the provisions of the Wagner Act, § 10(f), which gives a right of review to "any person aggrieved by a final order of the Board", determines the nature and scope of the review by the court of appeals.

The single issue which we are now called on to decide is whether the certification by the Board is an "order" which, by related provisions of the statute, is made reviewable upon petition to the Court of Appeals of the District or in an appropriate case to a circuit court of appeals. The question is distinct from another much argued at the Bar, whether petitioners are precluded by the provisions of the Wagner Act from maintaining an independent suit in a district court to set aside the Board's action because contrary to the statute, and because it inflicts on petitioners an actionable injury otherwise irreparable.

By the provisions of the Wagner Act the Board is given two principal functions to perform. One, defined by § 9, which as enacted is headed "REPRESENTATIVES AND ELECTIONS", is the certification, after appropriate investigation and hearing, of the name or names of representatives, for collective bargaining, of an appropriate unit of employees. The other, defined by § 10, which as enacted is headed "PREVENTION OF UNFAIR LABOR PRACTICES", is the prevention by the Board's order after hearing and by a further appropriate proceeding in court, of the unfair labor practices enumerated in § 8. One of the outlawed practices is the refusal of an employer to bargain with the representative of his employees. § 8(5).

Certification involves, under § 9(b), decision by the Board whether "the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof", and the ascertainment by the Board under § 9(c) of the bargaining representative who, under § 9(a) must be "designated or selected . . . by the majority of the employees in the unit appropriate for such [bargaining] purposes". The Board is authorized by § 9(c) "whenever a question affecting commerce arises concerning the representation of employees" to investigate "such controversy" and to certify the names of the appropriate bargaining representatives. In conducting the investigation it is required to provide for appropriate hearing upon due notice "and may take a secret ballot of employees, or utilize any other suitable method" of ascertaining such representatives. By § 9(d) whenever an order of the Board is made pursuant to § 10(c) directing any person to cease an unfair labor practice and there is a petition for enforcement or review of the order by a court, the Board's "certification and the record of such investigation" is to be included in the transcript of the entire record required to be filed under § 10(e) or (f), and the decree of the court enforcing, modifying or setting aside the order of the Board is to be made and entered upon the pleadings, testimony and proceedings set forth in the transcript.

It is to be noted that § 9, which is complete in itself, makes no provision, in terms, for review of a certification by the Board and authorizes no use of the certification or of the record in a certification proceeding, except in the single case where there is a petition for enforcement or review of an order restraining an unfair labor practice as authorized by § 10(c). In that event the record in the certification proceeding is included in the record brought up on review of the Board's order restraining an unfair labor practice. It then becomes a part of the record upon which the decree of the reviewing court is to be based.

All other provisions for review of any action of the Board are found in § 10 which as its heading indicates relates to the prevention of unfair labor practices. Nowhere in this section is there mention of investigations or certifications authorized and defined by § 9. Section 10(a) authorizes the Board "to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce". Section 10(b) prescribes the procedure of the Board when any person is charged with engaging in

any unfair labor practice, and requires that the person so charged shall be served with a complaint and notice of hearing by the Board with opportunity to file an answer and be heard. Section 10(c) directs the Board, if it is of opinion, as the result of the proceedings before it, that any person named in the complaint has engaged in an unfair labor practice "to issue" "an order" directing that person to cease the practice and commanding appropriate affirmative action. If the Board is of opinion that there has been no unfair labor practice it is directed "to issue" "an order" dismissing the complaint. Section 10(e) authorizes a petition to the appropriate federal court of appeals by the Board for the enforcement of its order prohibiting an unfair labor practice.

This brings us to the provisions for review of action taken by the Board in § 10(f) which is controlling in the present proceeding. That subdivision[1] appears as an integral part of § 10. All the other subdivisions relate exclusively to proceedings for the prevention of unfair labor practices. Both they and subdivision (f) are silent as to the proceedings or certifications authorized by § 9. Section 10(f), providing for review, speaks only of a "final order of the Board". It gives a right to review to persons aggrieved by a final order upon petition to a court of appeals in the circuit "wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia". It directs that the order shall be reviewed on the entire record before the Board "including the pleadings and testimony" upon which the order complained of was entered, although no complaint or other pleading is mentioned by § 9 relating to representation

[1] "(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive."

proceedings and certificates. Subdivision (f) provides that upon petition for review by an aggrieved person "the court shall proceed in the same manner as in the case of an application by the Board under subdivision (e)", and it is given the same jurisdiction "to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." See, *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364, 369.

In analyzing the provisions of the statute in order to ascertain its true meaning, we attribute little importance to the fact that the certification does not itself command action. Administrative determinations which are not commands may for all practical purposes determine rights as effectively as the judgment of a court, and may be reexamined by courts under particular statutes providing for the review of "orders". See *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125, 130, 135 *et seq.*; *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156. We must look rather to the language of the statute, read in the light of its purpose and its legislative history, to ascertain whether the "order" for which the review in court is provided, is contrasted with forms of administrative action differently described as a purposeful means of excluding them from the review provisions.

Here it is evident that the entire structure of the Act emphasizes, for purposes of review, the distinction between an "order" of the Board restraining an unfair labor practice and a certification in representation proceedings. The one authorized by § 10 may be reviewed by the court on petition of the Board for enforcement of the order, or of a person aggrieved, in conformity to the procedure laid down in § 10, which says nothing of certifications. The other, authorized by § 9, is nowhere spoken of as an order, and no procedure is prescribed for its review apart from an order prohibiting an unfair labor practice. The exclusion of representation proceedings from the review secured by the provisions of § 10(f) is emphasized by the clauses of § 9(d), which provide for certification by the Board of a record of a representation proceeding only in the case when there is a petition for review of an order of the Board restraining an unfair labor practice. The statute on its face thus indicates a purpose to limit the review afforded by § 10

to orders of the Board prohibiting unfair labor practices, a purpose and a construction which its legislative history confirms.

Upon the introduction of the bill which was enacted as the Wagner Act, Congress had pointedly brought to its attention the experience under Public Resolution 44 of June 19, 1934, 48 Stat. 1183. That resolution authorized the National Labor Relations Board, predecessor of respondent, "to order and conduct elections" by employees of any employer to determine who were their representatives for bargaining purposes. Section 2 provided that any order of the Board should be reviewed in the same manner as orders of the Federal Trade Commission under the Federal Trade Commission Act. The reports of the Congressional committees upon the bill which became the Wagner Act refer to the long delays in the procedure prescribed by Resolution 44, resulting from applications to the federal appellate courts for review of orders for elections.[2] And in considering the provisions of § 9(d) the committee reports were emphatic in their declaration that the provisions of the bill for court review did not extend to proceedings under § 9 except as incidental to review of an order restraining an unfair labor practice under § 10.[3] The bill was similarly explained on the

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[2] "WEAKNESSES IN EXISTING LAW. . . . (6) *Obstacles to elections.*—Under Public Resolution 44, any attempt by the Government to conduct an election of representatives may be contested *ab initio* in the courts, although such election is in reality merely a preliminary determination of fact. This means that the Government can be delayed indefinitely before it takes the first step toward industrial peace. After almost a year not a single case, in which a company has chosen to contest an election order of the Board, has reached decision in any circuit court of appeals." Sen. Rep. No. 573, Committee on Education and Labor, 74th Cong., 1st Sess., pp. 5, 6.

After referring to the procedure for review under Public Resolution 44, the House Committee declared: "The weakness of this procedure is that under the provision for review of election orders employers have a means of holding up the election for months by an application to the circuit court of appeals. . . . At the present time 10 cases for review of the Board's election orders are pending in circuit courts of appeals. Only three have been argued and none have been decided." House Rep., No 1147, Committee on Labor, 74th Cong., 1st Sess., p. 6.

[3] "There is no more reason for court review prior to an election than for court review prior to a hearing. But if subsequently the Board makes an order predicated upon the election, such as an order to bargain collectively with elected representatives, then the entire election procedure becomes part of the record upon which the order of the Board is based, and is fully reviewable by an aggrieved party in the Federal courts in the manner provided in section 10. And this review would include within its scope the action of the Board in determining the appropriate unit for purposes of the election. This provides a complete guarantee against arbitrary action by the Board." Sen. Rep. 573, Committee on Education and Labor, 74th Cong., 1st Sess., p. 14.

"As previously stated in this report, the efficacy of Public Resolution 44 has been substantially impaired by the provision for court review of election orders prior to the holding of the election. Section 9(d) of the bill makes clear that

Senate floor by the committee chairman who declared: "It provides for review in the courts only after the election has been held and the Board has ordered the employer to do something predicated upon the results of an election." 79 Cong. Rec., 7658. The conclusion is unavoidable that Congress, as the result of a deliberate choice of conflicting policies, has excluded representation certifications of the Board from the review by federal appellate courts authorized by the Wagner Act except in the circumstances specified in § 9(d).

An argument, much pressed upon us, is, in effect, that Congress was mistaken in its judgment that the hearing before the Board in proceedings under § 9(c), with review only when an order is made under § 10(c) directing the employer to do something "provides an appropriate safeguard and opportunity to be heard", House Rep., p. 23, and that "this provides a complete guarantee against arbitrary action by the Board," Sen. Rep., p. 14. It seems to be thought that this failure to provide for a court review is productive of peculiar hardships, which were perhaps not foreseen in cases where the interests of rival unions are affected.[4] But these are arguments to be addressed to Congress and not the courts. The argument too that Congress has infringed due process by withholding from federal appellate courts a jurisdiction which they never possessed is similarly without force. *Shanahan* v. *United States*, 303 U. S. 596; see *In re National Labor Relations Board*, 304 U. S. 486, 495.

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there is to be no court review prior to the holding of the election, and provides an exclusive, complete, and adequate remedy whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an election or other investigation pursuant to section 9(c). The hearing required to be held in any such investigation provides an appropriate safeguard and opportunity to be heard. Since the certification and the record of the investigation are required to be included in the transcript of the entire record filed pursuant to section 10(e) or (f), the Board's actions and determinations of fact and law in regard thereto will be subject to the same court review as is provided for its other determinations under sections 10(b) and 10(c)." House Rep., No. 1147, Committee on Labor, 74th Cong., 1st Sess., p. 23.

[4] Congress apparently recognized that representation proceedings under § 9(c) might involve rival unions. The House Committee said: "Section 9(c) makes provisions for elections to be conducted by the Board or its agents or agencies to ascertain the representatives of employees. The question will ordinarily arise as between two or more bona fide organizations competing to represent the employees, but the authority granted here is broad enough to take in the not infrequent case where only one such organized group is pressing for recognition, and its claim of representation is challenged." H. Rep. No. 1147, Committee on Labor, 74th Cong., 1st Sess., p. 22.

The Board argues that the provisions of the Wagner Act, particularly § 9(d), have foreclosed review of its challenged action by independent suit in the district court, such as was allowed under other acts providing for a limited court review in *Shields* v. *Utah Idaho Central Railroad Co.*, 305 U. S. 177, and in *Utah Fuel Co.* v. *National Bituminous Coal Commission*, 306 U. S. 56; cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. But that question is not presented for decision by the record before us. Its answer involves a determination whether the Wagner Act, in so far as it has given legally enforceable rights, has deprived the district courts of some portion of their original jurisdiction conferred by § 24 of the Judicial Code. It can be appropriately answered only upon a showing in such a suit that unlawful action of the Board has inflicted an injury on the petitioners for which the law, apart from the review provisions of the Wagner Act, affords a remedy. This question can be properly and adequately considered only when it is brought to us for review upon a suitable record.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.